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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1974

No. 74-1023

HENRY W. KERR, et al., *Petitioners,*

vs.

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, *Respondent,*

JOHN VAN GELDERN, et al., *Real Parties in Interest.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

OPINION AND DECISIONS BELOW

To be reviewed in this action are two sets of decisions relating to the compelled production of confidential state government documents for adversary inspection in one action in the United States District Court. One set of decisions relates to the production of inmate files and the other set to the production of personnel files and numerous categories of government correspondence, memoranda, etc. Each set is comprised of magistrate's findings and recommendations,

district court orders, and decisions of the Court of Appeals on denial of defendants'[1] separate applications for mandamus.

A. The Decisions Concerning the Compelled Production of Inmate Files:

The order of the Court of Appeals, dated December 18, 1974, has not been reported. This order is contained in the appendix to the petition for writ of certiorari, page xxxiii. The underlying discovery order of the district court, dated December 3, 1974, (A. 647) has not been reported. This order is included in the appendix to the petition for writ of certiorari, pages xxv-xxviii. The district court's order incorporates the text of an earlier discovery order of that court, dated August 12, 1974, and the August 12, 1974 order, in turn, incorporates the magistrate's findings and recommendations dated June 11, 1974. The district court's order of August 12, 1974 is printed in the appendix to the petition for writ of certiorari, pages xxix-xxxiii; the magistrate's findings and recommendations of June 11, 1974 is printed in the appendix to the petition for writ of certiorari, pages xxxiv-xlii.

B. The Decisions Concerning the Compelled Production of Personnel Files, etc.:

The opinion of the Court of Appeals, dated January 17, 1975, is reported at 511 F.2d 192 (9th Cir. 1975). This opinion is printed in the petition for writ of certiorari appendix pages i-xvi, and in the Single

[1]Throughout this brief the parties are referred to as defendants or plaintiffs according to their designation in the action in the district court.

Appendix (A. 707). The underlying discovery order of the district court dated June 20, 1974, as well as the magistrate's findings and recommendations, dated April 24, 1974, which are incorporated by reference in the district court's order, are also printed in the appendix to the petition for writ of certiorari, pages xv-xvii and xviii-xxiii respectively.

JURISDICTION TO REVIEW

The decisions of the Court of Appeals to be reviewed were entered on December 18, 1974 (No. 74-3392) and January 17, 1975 (No. 74-2206).

The decision of the Court of Appeals in action No. 74-3392 entered on December 18, 1974 denied a petition for writ of mandamus and/or prohibition to review a discovery order entered by the district court on December 3, 1974. By order dated December 31, 1974, Mr. Justice Douglas stayed the provisions of the district court's order of December 3, 1974 pending further consideration. (A. 706). By order dated February 1, 1974 Mr. Justice Douglas stayed the provisions of the district court's order pending final disposition of a timely filed petition for writ of certiorari. (A. 723).

On January 27, 1975 the Court of Appeals entered an order staying issuance of mandate under its decision of January 17, 1975 in No. 74-2206 pending final disposition of a petition for writ of certiorari filed on or before February 17, 1975. (A. 721). On February 13, 1975, the Court of Appeals continued this

stay of mandate pending final disposition of a petition for writ of certiorari filed by February 28, 1975. (A. 724).

Pursuant to Rule 23(5) Supreme Court Rules, a single petition for writ of certiorari was submitted. This petition was filed February 15, 1975, and granted May 27, 1975. The jurisdiction of this Court rests on Title 28 United States Code section 1254(1)

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

28 United States Code Section 1651(a):

"The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Federal Rules of Civil Procedure, Rule 26(b)(1):

"Scope of discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows: (1) In general. Parties may obtain discovery regarding any matter, not privileged, which is relevant to

the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of the persons having knowledge of any discoverable matter. It is no ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

California State Statutes:

While not directly at issue in this action, several California state statutes have frequently been cited below:

California Penal Code, sections 11105(b); 11120; 11122-11125; 1203.01; 2081.5; 3022; 3042; 3046.

California Government Code, sections 6254 (a), (c), (f), (k); 6255.

California Evidence Code, section 1040(b) (1), (2).

The text of these statutory provisions is included in the appendix to this Brief.

QUESTIONS PRESENTED

1. Whether Rule 26(b)(1), Federal Rules of Civil Procedure, extends to confidential state government documents a qualified privilege of non-disclosure

whereby their production for adversary inspection may be compelled only after the district court has examined them *in camera* and decided their utility in the pending action outweighs their confidentiality.

2. Whether this qualified privilege may be asserted by the state attorney general on behalf of his client who is a defendant and also the head of the state department which controls the documents where (a) the confidential nature of the documents is apparent; (b) the need for the documents in the pending action is not apparent, and (c) there are abundant alternative sources for the information for which the confidential documents might be sought.

3. Whether the compelled disclosure of confidential government documents for adversary inspection under the protective orders in this case, or under any protective order, is a permissible substitute for a qualified privilege of non-disclosure under Rule 26(b)(1), Federal Rules of Civil Procedure.

4. Whether the Court of Appeals erred in denying defendants' applications for mandamus inasmuch as the district court did not have the legal power to act or refuse to act as it did.

5. Whether the compelled production of confidential documents for adversary inspection under a court order which is not supported by probable cause to believe that the need for the documents in a pending action outweighs their confidentiality is an unreasonable search or seizure in violation of the Fourth Amendment to the United States Constitution.

STATEMENT OF THE CASE

A. Nature of the Action in the District Court:

This is a civil rights class action, on behalf of all adult male felons in California state prisons or on parole (A. 369), for declaratory and mandatory injunctive relief to determine what process is due at parole proceedings and at prison disciplinary proceedings. Plaintiffs are state prisoners. Defendants are the chairman, members, and administrative officer of the California Adult Authority (the state parole board), and the California Director of Corrections.

The action began over two and one half years ago upon the filing of a complaint which is substantially couched in terms that broadly assert numerous prisoners' rights for the purpose of utilizing the liberality of the federal rules of civil discovery.[2] Since the filing of the complaint massive discovery has been demanded by plaintiffs and furnished by defendants albeit in large part under order of the district court.

This proceeding on certiorari relates to a crucial part of the discovery the district court has ordered defendants to furnish plaintiffs: the compelled, indiscriminate disclosure of confidential state government documents and personnel files of no apparent utility to plaintiffs' action.

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[2]Plaintiffs tacitly acknowledge this in their arguments on relevancy of the material they have demanded on discovery:

> "Accordingly, plaintiffs are obliged to present evidence concerning all of these various components of the parole system in order to sustain their burden of proof at trial; and defendants' objections to relevance must therefore be received in the contexts of these wide-ranging factual allegations." (A. 93-94.)

B. The Complaint:

The complaint (A. 8-50), filed November 15, 1972, and first amended on June 26, 1974 (A. 294), purports to describe facts and circumstances of particular prison disciplinary and parole proceedings between May 1960 and September 1972[3] which involved one or another of the seven named plaintiffs, and alleges that at each such proceeding a plaintiff's rights were violated, including alleged rights to an attorney, to access to the information relied on by the hearing panel, to present witnesses, and to confront and cross-examine witnesses. (A. 18-39).

The complaint by general and conclusionary allegations, expressed in colorful prisoners' rights rhetoric, then asserts that Adult Authority members are each biased and personally unqualified for their official tasks; that the information in correctional files upon which the defendants rely is unreliable; that inmates are incapable of advancing their own interests at hearings; and that insufficient time is devoted to hearings. (A. 39-43).

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[3]The proceedings specified in the complaint are: (A) *Parole Considering Proceedings: Jones*—March 1971 (A. 23), December 1971 (A. 24), May 1972 (A. 25); *Van Geldern*—February 1972 (A. 32-33), May 1972 (A. 33-34); *Lewis*—April 1972 (A. 20). (B) *Parole Rescission Proceedings: Jones*—October 1970 (A. 22-23), December 1971 (A. 24), February 1972 (A. 24-25); *Van Nort*—December 1970 (A. 27); *Murrin*—September 1972 (A. 35-36). (C) *Parole Revocation Proceedings: Gardner*—May 1960 (A. 29-30), December 1971 (A. 31); *Van Geldern—April* 1970 (A. 32); *Lewis*—December 1971 (A. 19-20); *Chatfield*—December 1971 (A. 38-39), January 1972 (A. 38-39). (D) *Prison Disciplinary Proceedings*: *Jones*—September 1970 (A. 22-23), February 1972 (A. 24-25); *Van Nort*—November 1970 (A. 26-27); *Murrin*—July 1972 (A. 35-36). Term fixing or refixing attended the above proceedings on consideration, rescission, or revocation of parole.

Plaintiffs demand a declaratory judgment that the enumerated procedures each violated the Constitution (A. 45-46), and a mandatory injunction requiring defendants to accord all state prisoners and parolees the following items at the following proceedings (A. 46-47):

1. Items demanded:

(a) Timely notice of all proceedings, the charges involved, of the evidence to be relied on, and a timely opportunity to review the correctional files;

(b) An opportunity to be heard, to present witnesses, and to cross-examine witnesses;

(c) Counsel at any hearing;

(d) Hearing before an unbiased panel or official, and opportunity to challenge any panel or official for cause;

(e) A verbatim record of the proceeding, and a written decision stating the reasons for decision and the evidence relied upon.

2. Proceedings at which the above items are demanded:

(a) Proceedings on revoking, suspending, or rescinding parole; proceedings on re-fixing sentence;

(b) Proceedings on fixing or refusing to fix terms;

(c) Proceedings on imposition of serious disciplinary sanctions.

C. Defendants' Attempts for Dismissal of the Action:

On December 22, 1972, defendants filed a motion to dismiss the action upon the grounds that the complaint failed to state a claim against defendants upon which relief could be granted. Rule 12(b), Federal Rules of Civil Procedure. This motion and supporting memorandum urged the equitable relief demanded by plaintiffs was inappropriate because proceedings on habeas corpus would afford plaintiffs a plain, speedy, and more adequate remedy at law; and that declaratory relief was unnecessary and inappropriate by reason of intervening changes in the law.[4]

Upon denial of the motion to dismiss on March 8, 1973, and denial of certification for interlocutory appeal [Rule 5, Federal Rules of Appellate Procedures; 28 USC section 1292 (b)], on April 12, 1973, defendants petitioned the Court of Appeals for a writ of mandamus. *Kerr, et al. v. Weigel, et al.*, No. 73-1761 (9th Cir.). The petition was denied on May 10, 1973. Defendant's petition for rehearing in the Court of Appeals in light of *Preiser v. Rodriguez*, 411 U.S. 475 (May 7, 1973) was denied on May 30, 1973.

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[4]The motion pointed out to the district court that the process due at parole revocation proceedings had been delineated in *Morrissey v. Brewer*, 408 U.S. 471 (1972); that due process at prison disciplinary proceedings had been delineated under *Clutchette v. Procunier*, 328 F.Supp. 767 (N.D. Cal.1972) [affirmed 497 F.2d 809 (9th Cir. 1974), opinion on denial of rehearing, 510 F.2d 613 (9th Cir. 1974), cert. granted *sub nom. Enomoto v. Clutchette*, No. 74-1194 (June 9, 1975)]; that due process at parole date rescission hearings had been delineated in *In re Prewitt*, 8 Cal.3d 470, 503 P.2d 1326 (1972) (applying *Morrissey* to such proceedings), and that the Court of Appeals had recently determined there is no right under due process to the parole consideration procedures for which plaintiffs contend, *Dorado v. Kerr*, 454 F.2d 892 (9th Cir. 1972).

D. Procedures Relating to the Orders to Produce for Adversary Inspection the Confidential Contents of Inmate Files:

By letter dated November 5, 1973, plaintiffs requested defendants to stipulate to the production of every twentieth inmate file in institutions of the California Department of Corrections. (A. 234-235). This would involve the files of about 1,000 inmates. By letter dated November 8, 1973 defendants declined to stipulate.[5]

On May 15, 1974 plaintiffs filed a motion for an order requiring, in part, that "plaintiffs' counsel be permitted to inspect at random every twentieth file of inmates in the California prison system" (A. 232).[6] Defendants opposed this demand on several grounds including specified governmental requirements of confidentiality, the interest of the other inmates against an unwarranted invasion of their privacy (A. 257-258) and on Fourth Amendment grounds (A. 259).

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[5]At the time this request was made by plaintiffs, defendants were about to file their response (A. 57) to plaintiffs' June 21, 1973 request for documents (A.51). Item No. 1 of this request demanded the production of the correctional files of each of the named plaintiffs.

[6]This motion also sought an order requiring that members of the California Bar be permitted to attend in groups of three and to take notes at parole granting hearings, and that all parole granting hearings be tape-recorded up until the time of commencement of trial. (A. 232). The matter of attendance of attorneys at parole granting hearings was resolved by mutual agreement of counsel (A. 288; petition of writ of certiorari, appendix, page xxix), as a result of which 24 attorneys designated by plaintiffs' counsel attended and took notes at a total of 160 hearings. (A. 602, 676).

The magistrate recommended denial of plaintiffs' request to record parole consideration hearings (petition for certiorari, appendix, pages xxxviii-xxxix). On plaintiff's request for review of this decision (A. 276) the district court on August 12, 1974 ordered all such hearings at two state prisons to be recorded by designees of counsel for plaintiffs (petition for certiorari, appendix, pages

The motion was argued and submitted to a magistrate[7] who, on June 11, 1974, filed findings and recommendations that the files of inmates be produced under a protective order restricting examination to attorneys for plaintiffs and their use only in connection with this action (petition for certiorari, appendix, pages xxxix-xl).

With their notice of intent to seek review of the magistrate's decision, defendants filed a statement of objections (A. 273), followed by a formal request for review by the district judge (A. 287).[8] On August 12, 1974 the district court filed its order incorporating and affirming the magistrate's decision with modifications, including a provision that plaintiffs' counsel may inspect the files of any 200 inmates whose parole consideration hearings are tape-recorded (see footnote 5 *supra)* and who consent to such inspection (petition for certiorari, appendix, pages xxxi-xxxiii).

By letter dated September 27, 1974, plaintiffs' counsel furnished their first designation of inmates whose

xxx-xxxi). Through November 1974 approximately 1200 such hearings were recorded (A. 602), despite repeated motions by defendants to terminate the recordings. The last such denial of a motion to terminate the recordings appears in the district court's order filed December 3, 1974 (A. 649). Defendants' petition for mandamus in the Court of Appeal in No. 74-3392 (A. 651) sought review of this matter (A. 652-653, 674-677) as well as of the compelled production of the contents of inmate files. However, plaintiffs' letter to the Court of Appeal in opposition to this petition sought to render this question moot by announcing for the first time that plaintiffs were abandoning the recordings (A. 696).

[7]The district court ordered all discovery motions to be heard first by a magistrate.

[8]Plaintiffs also requested review of the magistrate to the extent his decision would deny them recordings of parole consideration proceedings. See footnote 5 *supra*, page 11.

files were to be examined under the order (A. 529-531).[9] The files of twenty-two inmates within the terms of the order were furnished, and inspected by plaintiffs' counsel on October 9, 11, and 15, 1974 (A. 497-498). However, as a preliminary matter, confidential documents were withheld by the Department of Corrections from some of these files. These documents included reports from confidential informers, crime partner information, sensitive clinical data, investigative reports accompanying visitor requests, and confidential communications from judges and district attorneys. Each document withheld was identified in writing as was the reason for withholding it, and plaintiffs' attorneys were furnished with the writing. The texts of these notices are printed at A. 502-524.

On October 9, 1974, the first day of inspection of the files, counsel for plaintiffs and defendants had a telephone conversation about the withheld documents (A. 539-540, 447-448, 460-461). Counsel for defendants stated the documents were withheld because they were confidential; that the documents, for the most part, were unrelated to plaintiffs' case; and that if particular withheld documents appeared to counsel to be relevant in this action, counsel should so inform counsel for defendants who would then request the Department of Corrections to re-evaluate its decision in light of counsel's expressed need for the documents. (A. 539-540).

[9]Twenty-eight inmates are listed, six of whom did not come within the provisions of the order limiting inspection to inmates whose hearings had been recorded and who had consented to record inspection.

Counsel for plaintiffs continued their inspection of the files.[10] By letter dated October 15, 1974, counsel for defendants again emphasized that the documents were withheld as a preliminary matter and reiterated to counsel for plaintiffs that if they wished to inspect any of the confidential documents withheld, they should express some specific need for them in the pending action whereupon the withholding of the documents would be re-evaluated in the light of such need. (A. 525-528). This letter, as well as the telephone conversation of October 9, 1974, sought negotiations between counsel and then, if necessary, presentation of the documents to the district court for an *in camera* inspection and balancing of the interests in confidentiality against plaintiffs' need for the documents in the action.

Rejecting this procedure, plaintiffs filed on October 19, 1974, their motion for enforcement, clarification, and sanctions, which requested that the files be furnished intact and asserted that defendants violated the district court's order of August 12, 1974, by withholding the confidential documents from production (A. 446-449). The motion also requested that plaintiffs be allowed to make photocopies of any or all contents[11] of the files (A. 446, 452), and that inspection

[10]On October 9, 1974 five files were inspected. Two were inspected on October 11, 1974 and sixteen files (one of which had also been inspected on October 9, 1974) were inspected on October 15, 1974). (A. 497-499).

[11]The language "any or all" contents does not appear in the motion, but does appear in plaintiffs' proposed order (not printed in the Single Appendix) and in the district court's order of December 3, 1974 (A. 649). (Pet. for Certiorari, Appendix, p. xxvii).

not be limited to files of inmates whose parole consideration proceedings had been recorded (A. 453-455). Defendants filed a detailed opposition to this motion (A. 470-541) to which plaintiffs filed a response (A. 542-560), followed by defendants' reply (A. 561-568).

When the matter was heard on October 31, 1974, the district court made it clear that the preliminary withholding of the documents was regarded as a violation of the discovery order and threatened defendants, and counsel for defendants, with contempt proceedings if this or any other violation out of an order occurred.[12] The district court announced that a forthcoming written order would provide that (1) the inmate files subject to inspection include the files of inmates whose parole consideration proceedings were not recorded; (2) the contents of the files to be produced for inspection must include all material and all correctional files on the inmate designated; (3) plaintiffs could move for modification of the order of August 12, 1974, to permit photocopying the contents of the files inspected, and (4) plaintiffs' counsel could have the assistance of two certified law students in inspecting the files.

Plaintiffs filed on November 11, 1974, their motion for modification of the order of August 12, 1974 (A.

[12]All discovery motions in this action have been submitted on the basis of papers and files in the action and argument of counsel at appearances on the motions. The hearings before the court and before the magistrate have not involved the presentation of testimony. Accordingly, counsel have agreed that transcripts of the hearings need not be included in the Single Appendix.

Respective counsel's versions of the district court's threats of contempt during the above proceeding agree. (Pet. for Certiorari, p. 11; Plaintiffs' Memorandum in Opposition to Petitioners' Application for Stay Order of this Court, p. 4:12-21).

569). Defendants' written opposition included a countermotion for modification of the order insofar as it would require disclosure of confidential documents on demand by plaintiffs' counsel. (A. 599-600). This countermotion specified details of a suggested procedure to provide for negotiations between counsel, and then for an *in camera* inspection and a judicial balancing of respective interests prior to any compelled disclosure for adversary inspection of documents designated as confidential in inmate files. (A. 599-600).

The motions and countermotions were argued and submitted on November 21, 1974, whereupon the district judge dictated in open court the text of the order signed and filed December 3, 1974 (A. 647-650) (Pet. for Certiorari, Appendix, pp. xxv-xxviii). This written order includes the district court's determinations of October 31, 1974 and November 21, 1974, and incorporates by reference the order of August 12, 1974, which, in turn, incorporates by reference the magistrate's findings and recommendations dated June 11, 1974.

Defendants filed their petition for mandamus and request for immediate stay in the Court of Appeals on December 13, 1974 (A. 651-691). The immediate stay was granted on the same date (A. 698). Plaintiffs submitted to the Court of Appeals a response in letter form on December 16, 1974 (A. 692-697), and on December 18, 1974, the Court of Appeals summarily denied the petition (A. 699).[13]

[13]By letter to the Court of Appeals dated December 19, 1974, defendants responded to plaintiffs' letter point by point (A. 700-705). Defendants at this time did not know the Court of Appeals had ruled on the petition. It was on December 26, 1974, that defendants first received notice of the Court of Appeals order denying the petition.

By letters dated December 27, 1974, plaintiffs' "proposed" detailed arrangements for their inspection of files under the district court's order of December 3, 1974, and furnished a list of ten inmates whose files were to be produced for inspection no later than January 3, 1975.

Upon defendants' application, on December 31, 1974, Mr. Justice Douglas signed an order staying the district court's order of December 3, 1974, insofar as it required disclosure of material in the inmate files. (A. 706). By Order dated February 1, 1975, Mr. Justice Douglas continued this stay pending the timely filing and disposition of this petition for writ of certiorari (A. 723).

E. Proceedings Relating to the Compelled Production of the Personnel Files and Departmental Memoranda, etc.:

On June 21, 1973, plaintiffs filed a request for the massive production of twenty-two broad categories of "documents." (A. 51).[14] Defendants' response agreed to furnish much of the material requested, and specified reasons, including various California statutes which make the material privileged, for declining to

[14]The request defined the term "document" or "documents" to include "all correspondence, memoranda, or both other records or writings of any kind or copies thereof where the originals are not available, including, without limitation, files, books, pamphlets, periodicals, letters, reports, charts, diagrams, records, drafts, studies, working papers, notes, papers, ledgers, journals, or other books of account, minutes of meetings (including without limitation every sort of staff meeting held by the California Adult Authority or the California Department of Corrections) diaries and personal inter-office memoranda" (A. 51).

furnish some documents and for objecting to some of plaintiffs' requests. (A. 57-75).

Nevertheless, plaintiffs on March 11, 1974, filed a motion for an order compelling discovery, which demanded production of every document in every category of the request for documents. (A. 76-146).[15] Defendants again responded in detail to oppose this motion (A. 147-196), and plaintiffs' replied to defendants' response (A. 197-215). Defendants' opposition is replete with assertions of irrelevancy of the documents demanded, as well as assertions of privilege or confidentiality as specific as the scope of the sweeping demands would reasonably allow (A. 147, 173-179, 180, 181-182, 186-187, 188-91).

On April 24, 1974, the magistrate filed his recommendations that "with respect to plaintiffs' motion for production of documents the same be granted as to each and every item." (Petition for certiorari, appendix, page xix).

Defendants duly noted their intent to review the magistrate's decision (A. 217), and on May 6, 1974 filed their formal request for such review (A. 220-

[15]This motion, and defendants' response in opposition to it, related also to plaintiffs' first set of interrogatories (A. 323-333), which are not directly at issue in these proceedings on certiorari. However, the information furnished under questions Nos. 1 and 2 of the interrogatories (A. 324-325) reduces to a minimum any of plaintiffs' need for the personnel files demanded in document Request No. 7 (A. 52-53). The district court sustained defendants' objections to parts B, F, G, H, I, and K of Question Nos. 1 and 2 of the interrogatories, but nevertheless compelled production of the personnel files and refused to inspect these files *in-camera* prior to such production for adversary inspection (district court's order of June 20, 1974, petition for certiorari, appendix, pages xvi-xvii).

231). Defendants asserted that *Preiser v. Rodriguez,* 411 U.S. 475 (1973), and *Clutchette v. Procunier,* 497 F.2d 809 (9th Cir. 1974),[16] cast doubt on the district court's jurisdiction to entertain a federal civil rights suit based on due process challenges to state term-fixing parole granting hearings (A. 223-225)[17] and that the documents requested in categories 7, 14, 15, 18, 20, 21, and 22 of the request for documents (A. 52-56) were of recognized confidentiality and entitled to at least a qualified privilege whereby their disclosure should not be ordered unless a compelling need for them had been asserted and then only after an *in-camera* balancing of the competing interests (A. 225-229).[18]

The matter was argued and submitted to the district judge who, on June 20, 1974, filed an order adopting the magistrate's findings and recommendations as the order of the court, except as modified. With respect to the documents request, the court adopted the magistrate's recommendations that *every* document be produced, and the only modification was to limit to counsel for plaintiffs, and no more than two investigators designated by such counsel, inspection of the inmate files of the named plaintiffs, and of the personnel files of defendants, hearing officers, and executive officers (petition for certiorari, appendix, page xvi).

[16]Opinion on denial of re-hearing, 510 F.2d 613 (9th Cir. 1974), cert. granted *sub nom Enomoto v. Clutchette,* No. 74-1194 (June 9, 1975).

[17]This question is now before this Court in *Weinstein v. Bradford,* No. 74-1287, certiorari granted June 2, 1975.

[18]Plaintiffs filed opposition on June 5, 1974 (A. 261-272).

The court's order expressly denied defendants' request for an *in-camera* inspection of the personnel files as well as defendants' request for a stay of the requirement of their disclosure pending disposition of a petition for mandamus filed within five days of the order (petition for certiorari, appendix, pages xvi-xvii).

On June 26, 1974, defendants petitioned the Court of Appeals for a writ of mandamus and/or prohibition, and applied for a stay of the district court's order insofar as it compelled the production of documents in categories 7, 14, 15, 18, 20, 21 and 22 of plaintiffs' request for documents. (A. 298-333). Supplemental authorities were furnished the Court of Appeals by letters dated July 16, 1974 [*Wolff v. McDonald,* 418 U.S. 539 (1974)], and July 25, 1974 [*United States v. Nixon,* 418 U.S. 683 (1974)], and on August 8, 1974 defendants filed a supplemental application for stay (A. 363-367). The Court of Appeals, on August 15, 1974 ordered that an answer be filed, and stayed the district court's order of June 20, 1974 to the extent it required production of any documents to which defendants had raised an objection on grounds of confidentiality. (A. 368). Plaintiffs' answer was filed August 30, 1974 (A. 371-423), and defendants reply was filed on September 4, 1974 (A. 424-444).

The matter was argued and submitted to the Court of Appeals on November 14, 1974 and on January 17, 1975 the court rendered its opinion denying the petition for mandamus and vacating the stay (A. 707;

petition for certiorari, appendix, pages i-xiv; *Kerr, et al. v. USDC, et al.,* 511 F.2d 192 (9th Cir. 1975).) The Court of Appeals stayed issuance of mandate under its decision pending disposition of these proceedings. (A. 721, 724).

F. Other Discovery Afforded Plaintiffs:

Plaintiffs have demanded and have been furnished other discovery in massive proportions:

1. *Interrogatories:* Plaintiffs have propounded and been furnished answers and supplemental answers to three sets of interrogatories which have asked hundreds of questions of the defendants.

2. *Request for Admissions:* Plaintiffs have propounded and been furnished responses to two sets of requests for admissions totaling well over 200 such requests.

3. *Request for Documents:* Plaintiffs have propounded numerous requests for documents seeking production of all documents in dozens of categories.

4. *Recordings:* As of the time the petition for writ of certiorari was filed, plaintiffs had recorded approximately 1,200 parole consideration hearings. See footnote 6 above, pages 11-12. In March 1975 the Adult Authority instituted significant changes in the parole consideration procedure. On this basis plaintiffs requested and the district court ordered further recordings be made. As a result, several hundred additional parole consideration hearings were recorded by plaintiffs during the months of April and May 1975.

5. *Depositions:* As of the time the petition for writ of certiorari was filed plaintiffs had taken depositions, totaling over 1,400 pages, of nine members of the Adult Authority, the administrative officer of the Adult Authority, of three Adult Authority hearing representatives, of a psychiatrist employed by the Department of Corrections, of a correctional counselor employed by the Department of Corrections, and of two research supervisors employed by the Department of Corrections. The depositions of all these persons included many questions of their backgrounds, education, and work experience and the depositions of the Adult Authority members and hearing representatives focused on the parole consideration process.

On the basis of institution of the new parole considerations procedures, plaintiffs requested, and the district court ordered, additional depositions of eight persons: the secretary of the California Health and Welfare Agency (of which the Department of Corrections and the Adult Authority are parts); the new chairman of the Adult Authority (the defendant Procunier), and of six members or hearing representatives of the Adult Authority. These depositions were taken the months of April and May 1975 and will total about 400 pages.

6. *Visits and Observations:* Many persons are available to testify for plaintiffs with respect to the nature of the parole consideration process and of the interests at stake. Twenty-four attorneys designated by plaintiffs, including plaintiffs' attorneys of record, have attended and taken notes at 160 parole considera-

tion hearings. Many dozens of lay persons designated by plaintiffs have attended these proceedings as operators of recording devices at the total of approximately 1,500 parole consideration hearings recorded. All California state prison inmates, members of plaintiffs' class, have participated in parole consideration hearings and counsel for plaintiffs as well as designees of such counsel may interview these members of the class under separate orders of the district court not here at issue. In addition, plaintiffs may call members of the parole board, hearing representatives, and numerous correctional personnel who have personal knowledge of these proceedings.

7. *Inmate Files:* Under order of the district court herein to be reviewed, plaintiffs are entitled to examine the contents of the correctional files of any 200 inmates designated by them. The number of items which are highly confidential and entitled to protection as asserted herein is small when compared with the total contents of the files. Plaintiffs will be authorized to examine this large portion of the contents of inmate files with respect to which a qualified privilege is not asserted and this will be done pursuant to recently established regulations of the Director of Corrections the text of which is printed in the Single Appendix. (A. 604-646).

Indeed, by letter dated June 4, 1975, counsel for plaintiffs have requested the opportunity to inspect inmate files under these procedures acknowledging that the Department of Corrections by reason of the certiorari proceeding may withhold from inspection

any documents which are considered to be confidential. With respect to the documents to be furnished, counsel acknowledged in the letter that "we consider ourselves still bound by the provisions in Judge Weigel's orders limiting our use of these documents to the *Van Geldern* case." The text of counsel's letter is printed in the appendix to this brief, pages i-ii. By letter dated June 10, 1975, defendants agreed to permit such inspection under certain conditions specified in the letter and the text of this document is printed in the appendix to this brief at pages iii-v.

G. Present Status of the Action in the District Court:

Almost immediately after certiorari was granted, counsel for plaintiffs drafted and sought leave to file a second amended complaint, insisted on the prompt commencement of trial, stated that trial could proceed without the documents involved in the certiorari proceedings, and stipulated orally that plaintiffs would waive the prejudice caused by withholding the documents. Defendants opposed plaintiffs' motions for leave to file the second amended complaint, and moved for an order staying the commencement of trial for numerous reasons including the pendency of the instant proceedings on certiorari, and the pendency in this Court of *Weinstein v. Bradford,* No. 74-1287 (whether due process at state parole consideration hearings may be litigated under 42 USC §1983), and *Enomoto v. Clutchette,* No. 74-1194 (whether the procedures comporting to due process at disciplinary hearings will be prescribed by lower federal courts or by state administrators).

Plaintiffs opposed defendants' motion for stay and insisted that trial begin promptly. In their written opposition plaintiffs stated:

> "Of the two parties to the present case, it is only plaintiffs who could be prejudiced by proceeding to trial, since they have been denied access to documents important to proving their case. Yet, (because of the prejudice that would come to them from not proceeding) they are willing and desire to proceed to trial without the benefit of the documents that would have been discovered pursuant to the order appealed in *Kerr*. If any interest of the defendants is involved at all, it is aided by proceeding without the plaintiffs having obtained complete discovery."

The motions were heard in the district court on June 25, 1975 whereupon the judge ruled from the bench granting plaintiffs' motion to file the second amended complaint, denied defendants' motion to stay trial, and set commencement of trial for September 8, 1975.

The second amended complaint adds new defendants, individually and as successors in interest to some of the original defendants, but retains all the original defendants in their capacities as individuals, and as officials, or *former* officials. The claims in the new complaint are confined to parole consideration and term-fixing proceedings, and to prison disciplinary proceedings. The new complaint asserts no claims for due process at parole rescission or parole revocation proceedings.

New claims are asserted in the second amended complaint in that plaintiffs for the first time seek: a

declaratory judgment, implemented by broad injunctive relief, that the California indeterminate sentence law is invalidly administered under the United States Constitution, and under the California Constitution; an injunction compelling defendants and their agents to manage state treasury funds to establish, implement, and monitor new procedures comporting to due process; appointment of a magistrate or special master to supervise the establishment and implementation of such procedures; and payment of plaintiffs' costs and attorney and witness fees.

On July 8, 1975, by reason of the new allegations in the second amended complaint, defendants filed notice of the requirement of a three judge district court under Title 28, USC section 2281. Defendants have also given notice, under local court rules, that the instant case is related to another case pending in the district which also seeks to enjoin, on constitutional grounds, the California indeterminate sentence law.

SUMMARY OF ARGUMENT

The district court's discovery orders are not only indiscriminate (they require production of all personnel records of all parole board members and hearing officers and all contents of all correctional files of any 200 inmates designated by plaintiffs), the orders also preclude any attempts by defendants to segregate particular confidential documents for an informed determination by the district court of whether their confidentiality is outweighed by any utility the documents may have to the plaintiffs in their action below.

Under Rule 26(b)(1), Federal Rules of Civil Procedure, the federal courts recognize a qualified privilege to protect confidential government documents from unnecessary disclosure. The qualification of the privilege is that a confidential document may be ordered disclosed if its confidentiality is outweighed by the utility of the document to the proponent of its discovery in the pending action. This qualified privilege extends to confidential state government documents. The personnel files of members and hearing officers of a state parole board, as well as specified portions of the contents of correctional files of state prisoners are of confidential nature. Indeed, by virtue of the protective provisions, even though inadequate, in the discovery orders, the magistrate and the judges below recognized that these categories of documents are confidential.

These categories of documents are of no apparent utility to the plaintiffs in this civil rights class action brought by state prisoners to determine what process is due at administrative proceedings concerning parole or discipline. Plaintiffs have been furnished massive discovery on the nature of these proceedings and of the interests they involve.

Under the circumstances of this case it was proper for counsel, the attorney general, to assert the qualified privilege. First, unlike an absolute privilege, the assertion of a qualified privilege does not call for abdication of judicial control over the evidence, but seeks an affirmative exercise of judicial control. Second, as the confidential nature of the documents is

apparent and was recognized by the judges below, a formal writing from the head of the department which controls the documents was not necessary. Third, in asserting the qualified privilege, the attorney general acted on behalf of parties to the action who were, in fact, the heads of the departments which control the documents ordered produced. Fourth, with respect to the confidential contents of inmate files, a more particularized and formal assertion of confidentiality is impossible until the files to be produced are designated by plaintiffs. Accordingly, the reasons heretofore relied on for requiring formal and personal assertion of privilege are absent.

The Fourth Amendment insures that reasonable expectations of privacy will be protected. The primary means by which such interests are protected is the prior informed determination of a judicial officer that the disclosure sought is not unreasonable. In considering the motions to compel production, the district court abdicated its responsibility to make such a determination. As the resulting orders issued in derogation of the limitations inherent in the Fourth Amendment, they must be set aside.

The compelled production of confidential documents for adversary inspection is no less a court ordered search under a discovery order than under a search warrant. Such an order, and the search required by it, are invalid under the Fourth Amendment if they are unreasonable. It is not reasonable to jeopardize the confidentiality of documents by compelling their production for adversary inspection where confidentiality

is apparent and recognized; the utility of the documents to the adversary is not apparent; and where an abundance of alternate information has been furnished.

The qualified privilege of non-disclosure of confidential documents, and the procedures herein requested to implement it, are necessary to a reasonable and valid order.

The qualified privilege should not be viewed by the courts with hostility as an impediment to disclosure of the truth in pending litigation. Unlike an absolute privilege, the qualified privilege does not block information from the court, but only from an adversary, and then only where legitimate public policy favoring confidentiality outweighs the litigant's need for the information in the pending action. The compelled, indiscriminate production of the documents for adversary inspection will not enhance the court's search for the truth. Even if the contents of the documents are highly relevant and material to the subject matter of the action (in which case the documents would probably be ordered produced anyway, after an *in-camera* inspection and balancing), there is no requirement that plaintiffs furnish them to the court. Indeed, to the extent that documents would tend to undermine plaintiffs' allegations, it is likely counsel would not volunteer them for the court's consideration.

The compelled disclosure of confidential government documents under a protective order is neither the equivalent of, nor an adequate substitute for, a qual-

ified privilege of non-disclosure, and is not the equivalant of an informed and particularized exercise of judicial discretion.[19] Neither the magistrate nor the district judge examined any of the documents prior to compelling their disclosure for adversary inspection.

Relief from the requirements of the district court's discovery order is available in no other court, and review on appeal after judgment in the district court will be inadequate to cure the irreparable harm which will result from adversary inspection of the confidential documents.

The standard for when mandamus should be granted to review interlocutory discovery orders differs among the courts of appeals. The Court of Appeals in this case relied on the strictest standard. Nevertheless, even under such a standard, mandamus should have been issued. There is a need, however, to delineate uniform standards for when mandamus should be granted to review such orders, and the need is especially great in actions initiated by state prisoners against state officials where discovery is easily abused.

[19]The protective provisions are illusory and inadequate. Although the protective orders limit inspection of the actual documents, the use of copies is less limited, and discussion of their contents is not limited. Use of the documents is limited only by a vague standard: to the extent necessary to the conduct of this action. The orders do not specify what measures must be taken by counsel (there are presently 7 counsel of record for plaintiffs, from at least 4 different law firms) or their investigators to assure compliance with the protective provisions, nor are these provisions for the ultimate disposition of copies, or copies of copies, which counsel may make of the documents. The risk of irreparable harm from further disclosure of the documents or their contents, through mistake, inadvertence, or otherwise, will continue beyond the termination of this litigation.

To the extent the term "privilege" in Rule 26(b)(1) takes its meaning from the law of evidence, section 501 of the Federal Rules of Evidence can be expected to generate divergent views concerning the discovery of confidential government documents. This circumstance also increases the need for advisory mandamus where, as here, the problem is a recurring one in the trial court.

The orders of the district court, as well as the opinion of the Court of Appeals, continue in effect, stayed only by these proceedings. The questions raised, moreover, are of exceptional significance in this action, and in other civil rights actions brought by prisoners in the federal courts in California and elsewhere. *See Enomoto v. United States District Court*, No. A-732, petition for certiorari filed May 28, 1975.

ARGUMENT

I

THE DECISIONS BELOW CONTRAVENE RULE 26 AND UNREASONABLY JEOPARDIZE VITAL INTERESTS BY DISREGARDING THIS PARAMOUNT LIMITATION OF THE SCOPE OF FEDERAL CIVIL DISCOVERY.

The district court knew that the state government documents which it ordered indiscriminately disclosed were confidential in nature. The court knew that the heads of the departments having control over the documents, defendants, vigorously opposed disclosure of the documents. The court further knew that defendants' assertions of confidentiality were based on important interests recognized in both state and federal law. The district court did not know of what

use the documents would be to plaintiffs because none was offered by plaintiffs beyond mere conjecture and because the court refused to examine the documents.

The record before the district court, and before the Court of Appeals, shows defendants in fact objected to the production of documents whose apparent confidentiality clearly outweighed any apparent need of plaintiffs for them. Accordingly the documents were privileged from discovery under Rule 26(b)(1).

Plaintiffs could have volunteered, or the court could have sought from plaintiffs, some specification of need, beyond mere conjecture, for the documents in this action. This was not done. The balance might have changed, had the court examined the documents, or any of them, and reasonably determined that the assertions of confidentiality were not well taken. This was not done, although defendants offered to furnish the documents for this purpose.

In *United States v. Reynolds,* 395 U.S. 1, 11 (1953), this Court stated that the showing of necessity by the proponent of discovery will determine how far the court should probe in satisfying itself that the occasion for invoking privilege is appropriate. Under this view, the stronger the necessity for the document, the deeper should be the probe into whether privilege is appropriate—the deepest probe being an *in camera* inspection. A necessary corollary is that even where a strong showing of necessity is made, disclosure to an adversary of material known to be of a confidential nature should not be compelled without a prior *in camera* inspection.

The compelled disclosure in this case without any *in camera* inspection, upon plaintiffs' most dubious showing of necessity, contravened Rule 26(b)(1).

A. The Decisions in Fact Compel the Disclosure of Confidential Matter for Adversary Inspection:

Through counsel, defendants asserted that some documents encompassed by plaintiffs' sweeping demands were privileged and protected from discovery in this action because they were confidential to a degree which outweighs any apparent need plaintiffs may have for them to advance their claims. Defendants specified the interests upon which their assertions of confidentiality are founded.

1. The Confidentiality of Inmate Files:

The confidentiality of parts of the contents of inmate files is founded on interests in institutional security; protection of informants from inside and from outside the prisons; staff security; avoiding danger to the safety of other persons; preventing impairment of the adjustment or rehabilitation of the inmate; encouraging candor and complete disclosure of information concerning inmates from public officers, and private citizens; and requirements of confidentiality under state statutes. (A. 173-177, 226-228, 255-259, 289-293). Several authorities, state and federal, recognizing the validity of these interests as a basis for confidentiality, were cited. (Ibid). Defendants also asserted that the inmates have an interest against an unwarranted invasion of their privacy. (A. 257).

Defendants urged that, as plaintiffs' demands furnished no cause to believe they needed the documents and offered no specification of the information sought or of particular documents to be disclosed, compelled disclosure would violate the Fourth Amendment. (A. 259). Where it was possible to do so, defendants furnished lists of particular documents which were highly confidential, and the reasons they were confidential. (A. 502-524).

Defendants repeatedly requested that any disclosure of these confidential materials for adversary inspection be preceded by negotiations between counsel and an *in-camera* inspection as necessary. (A. 176-177, 226-229, 257-258, 525-526). Finally, defendants proposed a detailed, reasonable procedure for doing this. (A. 525-526, 599-600).

2. The Confidentiality of Personnel Files:

The confidentiality of the contents of the personnel files is founded on interests against unwarranted invasions of privacy. These interests are recognized under state law as rising to the level of privilege, California Government Code, section 6254(c)[20] (A. 60-61, 181-182, 225-229). An *in-camera* inspection of these documents was requested by defendants (A. 225-229) and denied (USDC Order of June 20, 1974; Petition for Certiorari, Appendix, pages xvi-xvii).

3. The Confidentiality of the Intra-Governmental Documents:

The confidentiality of the numerous categories of memoranda, correspondence, etc. is founded on public,

[20]The text of this statute is printed in the appendix to this Brief, pp. xii.

governmental, and departmental interests in a free exchange of ideas, recommendations, opinions, etc., with candor, during the course of deliberation and considerations of policy making. (A. 177-179, 186-187, 188-191, 228-229). Specific federal authority recognizing these interests as a valid basis for confidentiality was furnished the district court. (Ibid). An *in-camera* inspection was requested. (A. 225-229).

4. The District Court's Disposition of the Matter:

The district court gave no reasons for its decisions to indiscriminately compel the production of all the contents of all the files of any 200 inmates designated by plaintiffs, as well as the production of the entire contents of the personnel files, and "each and every" document requested from the numerous categories of memoranda, correspondence, etc. However, we do know that a basis for the decisions was *not* rejection by the court of the confidential nature of the documents. The protective orders recommended by the magistrate, and included in the district court's orders, acknowledge that the contents of inmate files, and of the personnel files, are to some degree confidential.

Although recognizing the interests, the district court nevertheless refused to exercise informed consideration by examining the documents. Defendants' repeated good faith requests for such a judicial review were brushed aside in favor of indiscriminate disclosure under illusory protective orders.

5. The Court of Appeals' Disposition of the Assertions:

a. The Personnel Files, and Memoranda, etc.:

The Court of Appeals opinion, dealing with the personnel files and departmental memoranda, relied on *United States v. Reynolds,* 345 U.S. 1 (1953), and declined to reach the question of whether the common law governmental privilege covered these documents, finding that the privilege was not formally asserted and delineated by the department head having control over the matter (A. 717-718):

> "In the civil rights suit, petitioners' counsel merely raised a blanket objection covering any and all documents in request numbers 7, 14, 16, 18, 20, 21, and 22. Formally claiming a privilege should involve specifying which documents or *class of documents* are privileged and for what reasons, *especially where the nature of the requested documents does not reveal an obviously privileged matter.*" (Emphasis added). (A. 719).

The Court of Appeal's reference to the common law governmental privilege cited *Committee For Nuclear Responsibility, Inc. v. Seaborg,* 463 F.2d 788, 792-795 (D.C. Cir. 1971). *Seaborg,* in turn, relied on *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena,* 40 F.R.D. 318, 324 (D.C. 1966), affirmed on the basis of the District Court opinion, 384 F.2d 979 (D.C. Cir. 1967), cert. denied 389 U.S. 952 (1967), for the proposition that:

> "The government may still have an interest [short of military or diplomatic secrets], however, in avoiding disclosure of documents which reflect intra-executive advisory opinions and recommendations whose confidentiality contributes substantially to the effectiveness of government decision-making process." 463 F.2d 792.

The *Zeiss* opinion is more expansive:

> "What is decided, and all that needs to be decided, is that, as documents intergral to an appropriate exercise of the executive's decisional and policy-making functions, they are immune from the disclosure the claimants seek. 40 F.R.D. at 324.
>
> * * *
>
> "In striking the balance in favor of nondisclosure of intragovernmental advisory and deliberative communications, the privilege subserves a preponderating policy of frank expression and discussion among those upon when rests the responsibility for making the determinations that enable government to operate[16] [footnote omitted], and thus, achieves an objective akin to those attained by other privileges more ancient and commonplace in character.[17]"
>
> "[Fn.][17]"Essentially similar policies of uninhibited communication underlie such frequently used commonlaw privileges as those subserving the attorney-client and husband-wife relationships [Citation omitted]." 40 F.R.D. at 324-325.

Zeiss would apply this reasoning to exchanges among staff, civil servants, executive assistants, or between agencies. 40 F.R.D. at 324, footnote 16 at 325.

The very language used by plaintiffs to describe the documents requested also identified them as obviously within this privilege. A formal delineation of the privilege by defendants would not have served to further inform the court of the reasons the documents

were confidential. Indeed, that the documents were either irrelevant, or within the privilege is confirmed by plaintiffs' answer to the petition for mandate, where in urging the documents are "highly relevant to the subject matter of the litigation" (A. 376), plaintiffs summarized their demands as follows:

> "The documents whose production petitioners have resisted in this Court are (1) the personnel files of defendants Adult Authority members (respondent's Requests No. 7); (2) reports submitted by Adult Authority members and hearing representatives (i.d., No. 14); (3) written statements by members or hearing representatives taking a position on Federal or State legislation (i.d., No. 15); (4) written proposals for changing various aspects of the Adult Authority (i.d., No. 18); (5) memoranda written by defendant Henry Kerr, who at the time the complaint was filed was Chairman of the Adult Authority (i.d., No. 20); (6) documents which pertain to Adult Authority Policy Statements and Resolutions (i.d., No. 21); and (7) documents which concern the Adult Authority's adoption of new policies, procedures, criteria (i.d., No. 22)." (A. 377-378).

The confidential nature of all the documents thus described in plaintiffs' summary is patent. *Zeiss, supra.* The documents encompassed by the full text of plaintiffs' demands (A. 52-56), but not by this summary of relevant documents, were irrelevant, as well as also confidential.

b. The Inmate Files:

While the personnel files decision was pending in the Court of Appeals,[21] the mandamus proceedings concerning the district court's December 3, 1974 order (A. 647-650) were initiated (A. 651) and summarily rejected without opinion (A. 669), even though the district court's order, by its terms, precluded any attempt by defendants to comply with *Reynolds*:

> "All such central files made available upon request by plaintiff shall be produced without any material, memos, documents, summaries, reports, letters or other papers of any kind, shape or form, having been removed, altered, deleted or transferred in any way by defendants prior to plaintiffs' inspection.
>
> "IT IS FURTHER ORDERED that all material previously removed or withheld by defendants from files already requested by plaintiffs shall be made available to plaintiffs' counsel for inspection within ten days.
>
> * * *
>
> "IT IS FURTHER ORDERED in reference to the Order of this Court dated August 12, 1974 [Petition for Certiorari, Appendix, pp. xxix-xxxiii], that:
>
> 1. Defendants shall make available to plaintiffs, upon plaintiffs' request, the central file of any inmate within the California Prison System, whether or not hearings have been tape-recorded for such inmate, up to a maximum of 200 such files. Files previously made available shall be counted toward the maximum." (A. 648-649).

[21] The matter was argued and submitted on November 14, 1974 (A. 6), and decided January 17, 1975 (A. 707).

The material previously removed from the files was identified in the lists made at the time of removal and furnished counsel. (A. 502-524).[22] These lists were furnished to the district court as appendix A of Defendants' Opposition to Plaintiffs' Motion for Enforcement, Clarification and Sanctions, filed October 29, 1974 (A. 470-541), and were furnished to the Court of Appeals as Appendix M of the Petition for Writ of Mandamus, filed December 13, 1974. (A. 651, 690). The confidential nature of the listed documents is apparent, and any possible doubt could readily have been resolved had the district court examined the documents.

From all of the above, it is an obvious fact that the discovery orders compel the disclosure of confidential matter for adversary inspection.

B. The Decisions Below Are Unreasonable:

The decisions below thus present the spectacle of a court's refusal to inform itself from readily available sources before compelling the production of confidential matter for adversary inspection. The decisions serve no discernible interest. This unreasonable result is neither required nor justified by any articulated need for the documents, or by any provision of the discovery rules.

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[22]The departmental rules for access to the contents of inmate files changed during the course of the proceedings below to conform to *In re Olson*, 37 C.A.3d 783, 112 Cal.Rptr. 579 (1974), (A. 604-606). Defendants' opposition to plaintiffs' requests for the files of the named plaintiffs refer to the old regulations (see, A. 58, 73-75). The new regulations, effective August 1974, are at A. 606-645.

1. Plaintiffs' Need for the Documents Is, at Most, Dubious:

a. The Kinds of Rights Claimed Have Been Established in Other Cases Without Such Discovery:

Most of the items sought by plaintiffs have been obtained in other cases without such discovery demands. The requirments of due process at parole revocation proceedings have been delineated by this Court in *Morrissey v. Brewer,* 408 U.S. 471 (1972), and *Gagnon v. Scarpelli,* 411 U.S. 778 (1973). Due process at prison disciplinary proceedings has been delineated in *Wolff v. McDonald,* 418 U.S. 539 (1974). Due process at California parole rescission hearings has been delineated in *In re Prewitt,* 8 Cal.3d 470, 503 P.2d 1326 (1972), and *Gee v. Brown,* 14 Cal.3d 571, ... P.2d ..... (1975) (applying the rights set forth in *Morrissey,* and in *Scarpelli,* to state parole rescission). For parole consideration proceedings, a California state prisoner is given notice, an opportunity to appear and be heard, and to offer written information. He has the right to apply for parole, to have his application duly considered, to a good faith exercise of discretion which is neither arbitrary nor capricious, and to periodic reconsideration for parole. *In re Minnis,* 7 Cal.3d 639, 498 P.2d 997 (1972). He has the right to examine the documents relied on for consideration of parole (except for confidential matter the disclosure of which would jeopardize institutional security, or an informant), *In re Olson,* 37 Cal.App.3d 783, 112 Cal.Rptr. 579 (1974), and he has the right to a definitive written statement of reasons for denial of parole, *In re Sturm,* 11 Cal.3d 258, 521 P.2d 97 (1974).

The above cases are habeas corpus cases, and not civil rights actions, and all proceeded without the sweeping discovery demanded here by plaintiffs. See, *Harris v. Nelson,* 394 U.S. 286, 295-296 (1969).

b. Any Need of Plaintiffs for the Documents Is Minimized by the Other Discovery Furnished in this Action:

Whether process is due at state parole consideration proceedings depends primarily on the weight and nature of the inmates' interests involved,[23] and what process is due will depend on the involved interests of the state as well as of the inmate. *Morrissey v. Brewer, supra,* 408 U.S. at 483-486. The nature of the proceeding and the possible burden cast on it by the proposed rights may also be considered. See, *Hannah v. Larche,* 363 U.S. 420, 442 (1960).

The other discovery afforded plaintiffs in massive proportions will obviously serve to fully inform plaintiffs and the district court of each of the above considerations. This circumstance may be taken to greatly minimize plaintiffs' need for the documents. *United States v. Reynolds, supra,* 345 U.S. at 11. On the other hand, there is no reason to suspect that the contents of any of the confidential documents will further inform plaintiffs or the court of any of these interests. Indeed, plaintiffs' need for these documents is so vague that, if defendants refused to produce

[23]This interest is something less than the parolee's interest involved in a revocation proceeding:

> "It is not sophistic to attach greater importance to a person's justifiable reliance in maintaining his conditional freedom so long as he abides by the conditions of his release, than to his mere anticipation or hope of freedom." *Morrissey v. Brewer, supra,* 408 U.S. 471, footnote 8 at 482 (1972).

them, the district court would be ill equipped to impose the Rule 37(b) (2) (A) sanction, i.e., ordering established any designated facts concerning which the discovery was sought. Compare, *United States v. Reynolds, supra,* 345 U.S. at 5.

2. It Was Sufficient for Defendants to Assert a Qualified Privilege Through Counsel:

a. The Reasons for the Formal Requisites of Reynolds Are Absent in This Case:

United States v. Reynolds, supra, 345 U.S. 1 (1953), involved assertion of an absolute privilege from disclosure, even to the court, by a person not a party to the action, and concerned documents the confidentiality of which was not apparent until described in the assertions of privilege by the Secretary of the Air Force (345 U.S. at 3-5). This Court reasoned that assertion of the privilege need not be so detailed as to disclose what the privilege is meant to protect, that some formula of compromise of competing interests must be applied, that judicial control over evidence in a case cannot be abdicated to the caprice of executive officers, and that, in each case, the showing of necessity which is made by the proponent of discovery will determine how far the court should probe in satisfying itself that the occasion for invoking privilege is appropriate (345 U.S. at 9-11).

The result in *Reynolds* was that, without any *in-camera* inspection, a formal claim of privilege prevailed over dubious necessity. (345 U.S. at 11).[24]

[24]Although the opinion in *Reynolds* refers to a formal assertion of privilege by the head of the department having control over the documents sought, the Court also considered the affidavit of the

In the instant case only a qualified or conditional privilege was ultimately claimed; it was claimed by parties who are also the heads of the departments (Director of Corrections; Chairman of the Adult Authority) having control over the documents; the confidentiality of the documents was obvious from their description by the proponent of discovery; and plaintiffs' need for the documents was dubious on its face, and made more dubious by the other discovery afforded in massive proportions.

No abdication of judicial control over the evidence in the case was sought or intended by defendants. Indeed, defendants' request for an *in-camera* inspection of the documents is the very antithesis of this important concern expressed in *Reynolds*. Defendants sought direct judicial control over the evidence. If any such abdication is involved in this case, it is to the self-restraint of vigorous adversaries.

Upon the relative strength of the assertions of confidentiality and necessity in this case, the district court should have accepted the assertions of confidentiality, or examined at least some of the documents prior to determining whether their compelled disclosure for adversary inspection (and copying) is justified under the circumstances of this case.

b. The District Court's Order Precludes Compliance with Reynolds:

By its terms, the discovery order for production of inmate files precludes attempts to meet the procedures

Judge Advocate General. The affidavit is more descriptive, but nevertheless seems to be an assertion by the attorney for the department head.

of *Reynolds*. Until the plaintiffs designate the 200 inmates whose files are to be produced, it is impossible to actually consider the particular documents whose confidentiality will be jeopardized. When the first group of about 20 inmates was designated, attempts to segregate particular documents for such consideration were met with threats of contempt. The resulting order makes it unmistakably clear that nothing may be withheld from immediate production on demand by plaintiffs:

> "All such central files made available upon request by plaintiff shall be produced without any material, memos, documents, summaries, reports, letters, or other papers of any kind, shape or form, having been removed altered, deleted or transferred in any way by defendants prior to plaintiffs' inspection." (A. 648).

3. A Protective Order Is No Substitute for a Well Taken Privilege of Non-Disclosure:

The district court's discovery orders each compel the disclosure of confidential matter under protective orders designed to limit inspection of the documents to counsel for plaintiffs, and a few designees of such counsel, and to limit use of the documents to what is necessary, in the minds of such counsel, to the action. Nevertheless, if defendants' assertions of confidentiality are well taken, the documents are privileged from any disclosure. The needless disclosure of confidential matter to an adversary in fact jeopardizes what the privilege is meant to protect. See *United States v. Reynolds, supra,* 345 U.S. at 10. Accordingly, a protective order is no substitute for the privilege.

C. The Decisions Below Are Neither Required Nor Justified by the Federal Rules:

The rules of procedure except "privileged" matter from the scope of discovery,[25] but neither define the term, nor specify how assertions of privilege must be made or determined. In *United States v. Reynolds, supra,* this Court stated: "We think it should be clear that the term 'not privileged', as used in Rule 34, refers to 'privileges' as that term is understood in the law of evidence." 345 U.S. at 6.

There are three further considerations. First, Rule 26(b) (1) also states "it is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Second, in federal question cases in the district courts there is no certain law of evidence concerning "privilege" and chances for establishment of such law have been stifled by the evolvement and enactment of Rule 501, Federal Rules of Evidence.[26]

[25]Rule 26(b)(1), Federal Rules of Civil Procedure. The scope of discovery of documents under Rule 34 is limited by this provision:

> "Rule 34. Production Of Documents And Things And Entry Upon Land For Inspection And Other Purposes. (a) Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request . . . to inspect and copy, any designated documents . . . which constitute or contain matters within the scope of Rule 26 (b). . . ."

Rules 34, Federal Rules of Civil Procedure.

[26]ARTICLE V. PRIVILEGES

RULE 501

GENERAL RULE

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivisions thereof shall be determined in accordance with State law.

Third, the law of evidence is unsuited to accommodate the competing interests in pre-trial discovery demands for the disclosure of government documents which are confidential. Whether particular documents are confidential depends neither on the law of evidence nor on the nature of the pending action, but depends on independent interests and policies. Whether documents which are confidential should nevertheless be disclosed should depend on the needs and circumstances peculiar to the pending action.

What the term "privileged" should be taken to mean, and what *Reynolds* and numerous other cases treating the matter take it to mean,[27] is that the need for a confidential matter to remain so is greater than the need of the proponent for its disclosure in a particular case. This view would require only that, when confronted with an objection to the production of confidential matter, district courts take it upon themselves to exercise informed discretion in a reasonable manner. Whether particular matter is confidential may appear from the description of the matter in the demand for it, in the objection to its production, or, as

[27]See, e.g., *United States v. Nixon,* 418 U.S. 683 (1974); *Jabarra v. Kelly,* 62 F.R.D. 424 (E.D.Mich.1974); *Holmes v. Gardner,* 62 F.R.D. 70 (E.D.Pa.1974); *Gaison v. Scott,* 59 F.R.D. 70 (E.D.Pa. 1974); *Gaison v. Scott,* 59 F.R.D. 347 (E.D.Ha. 1973); *Frankenhauser v. Rizzo,* 59 F.R.D. 339 (E.D.Pa.1973); *Zeiss,* supra, 40 F.R.D. 318, 324ff (D.C.1966).

necessary, from examination of the document by the court—considered in the light of reason and experience. Similarly, the proponent's need for the matter may be made known to the court from the pleadings in the action, or from some other particularized showing—also considered in the light of reason and experience.

We have heard much below of the peculiar standing of a litigant to obtain information to advance his claim in federal court. No interest asserted by defendants would tend to unreasonably abridge this interest of plaintiffs. Defendants seek only to insulate the confidential documents from needless disclosure by placing between the documents and the adversary an informed exercise of discretion by the district court. No provision of federal law, of which defendants are aware, requires less. Indeed, for the reasons set forth in Argument II of this brief, the Fourth Amendment precludes outright rejection of the interests asserted by defendants.

Reynolds speaks of a reasonable formula of compromise between competing interests. 345 U.S. at 8-9. Apropos is the court's observation in *N.L.R.B. v. Capitol Fish Company,* 294 F.2d 868 (5th Cir. 1961):

> "As a matter of comity courts frequently do not require disclosure of the evidence when the *circumstances indicate* that the records should be confidential; if the court wishes to scrutinize it to make sure, the evidence may be examined *in-camera*. But the ultimate determination of the privilege remains with the courts." (Emphasis added). 294 F.2d at page 875.

Such expressions of reasonable compromise and comity, are especially compelling in the instant case. One district court has observed:

> "Discovery must be kept in bounds by weighing the burdens of production against the importance of the information sought. In the final analysis, this is what the numerous cited decisions really teach." *United States v. R.J. Reynolds Tobacco Company,* 268 F.Supp. 769, 774 (D.N.J. 1966).

The especially high potential for abuse of the liberal federal discovery rules by prisoners suing their custodians has been frequently noted. See, *Harris v. Nelson, supra,* 394 U.S. 286, 297 (1969); *United States Board of Parole v. Mehrige,* 497 F.2d 25, 29 (4th Cir. 1973), cert. denied 417 U.S. 918 (1974); *Scarpa v. United States Board of Parole,* 477 F.2d 278, 283 (5th Cir. 1973) (Brown, J. concurring), vacated and remanded for reconsideration of mootness, 414 U.S. 809 (1973); *Weller v. Dickson,* 314 F.2d 598, 602 (9th Cir. 1963) (Duniway, J., concurring) The potential for abuse has become a reality in this case. A line should have been drawn long ago by the district court, but was not.

The decisions below would invade recognized interests which are evident and important. Yet no discernible interest of plaintiffs is thereby served. The decisions are uninformed, unreasonable and incorrect. They should be corrected as should be the procedure by which they were made.

II

THE FOURTH AMENDMENT PRECLUDES COMPELLING PRODUCTION OF CONFIDENTIAL STATE DOCUMENTS WITHOUT A PRIOR INFORMED DETERMINATION THAT THE DOCUMENTS ARE NOT PRIVILEGED.

Expectations of privacy, insofar as they are reasonable, are protected by the Fourth Amendment. Compulsory process for the production of documents may not issue in derogation of the Fourth Amendment. Just as a search warrant may issue only upon probable cause, compulsory process may issue only upon statutory or constitutional authorization. Confidential state documents are privileged unless there is a showing and a determination that their utility in the litigation is paramount to their confidentiality. As there is no statutory authority for an order compelling the production of privileged documents, there is no statutory basis for an order compelling the production of confidential state documents without a prior informed determination that the documents are not privileged.

Moreover, there is no constitutional basis for a statute authorizing a federal court to compel the production of confidential state documents without any informed assessment as to whether or not their utility in resolving a claimed deprivation of federal rights by state officers is paramount to their confidentiality. Even when compulsory process is issued pursuant to a statutory and constitutional authorization, it runs afoul of the Fourth Amendment if the documents sought are not reasonably relevant to the underlying

purpose of the authorization, or if the specification of the documents is inadequate or excessive.

As the orders of the district court are without statutory and constitutional authorization, and as they are patently unreasonable, they must be set aside.

A. As the Expectation That Confidential State Documents Will Not Be Disclosed Unless the Justification for Disclosure Outweighs the Justification for Confidentiality is a Reasonable Expectation, It Is Protected by the Fourth Amendment:

The essence of the Fourth Amendment is the protection of reasonable expectations of privacy. As stated by this Court in *Warden v. Hayden,* 387 U.S. 294, 304 (1967): "We have recognized that the principal object of the Fourth Amendment is the protection of privacy rather than property, and have increasingly discarded fictional and procedural barriers rested on property concepts. (Citations omitted)." *See also Olmstead v. United States,* 277 U.S. 438, 478 (1928) [Brandeis, J., dissenting]. Accordingly, an expectation of privacy can be recognized in the complete absence of any property claim. *See Warden, supra,* 387 U.S. at 305. The protection afforded by the Fourth Amendment is not reserved solely for those suspected of criminal conduct. *See Camara v. Muncipal Court,* 387 U.S. 523 (1967). That which one "seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. (Citations omitted)." *Katz v. United States,* 389 U.S. 347, 351-352 (1967). This Court "referred in *Mapp v. Ohio,* 367 U.S. 643, 656, to the Fourth Amendment as creating a 'right to privacy, no less important than any other right carefully

and particularly reserved to the people.' (Citations omitted)." *Griswold v. Connecticut,* 381 U.S. 479, 485 (1965). Accordingly, an intrusion into the privacy upon which one has justifiably relied may constitute a search and seizure within the meaning of the Fourth Amendment. *See Katz, supra,* 389 U.S. at 353.

When a person communicates information to government officials in confidence, he may reasonably expect that the confidence will be maintained unless a justification for disclosure is found to outweigh the justification for confidentiality. In such circumstances, the reasonable expectation is not that disclosure is inevitable *(cf. Couch v. United States,* 409 U.S. 322, 335-336 (1973); *Grosso v. United States,* 390 U.S. 62, 66 (1968)), but rather that confidentiality will be asserted. Even though the government officials may desire the information, this does not in and of itself render the information public. *See Marchetti v. United States,* 390 U.S. 39, 57 (1968); *Grosso, supra,* 390 U.S. at 68. Information does not automatically assume a public character even when it is demanded by statute. *See Marchetti, supra,* 390 U.S. at 57; *Grosso, supra,* 390 U.S. at 68. Even with respect to so-called "required records", this Court has noted that "nothing in logic nor historical practice requires Congress at the same time to treat the records as public in the sense that they be open at all times to scrutiny by the merely curious. (Citation omitted). . . . [T]his opinion neither requires nor permits it." *Shapiro v. United States,* 335 U.S. 1, 27-28, n. 33.

A variety of interests are served by giving recognition to the expectation that information conveyed in confidence will not be disclosed absent an overriding justification. The state has an interest in obtaining information regarding its employees. *See Shelton v. Tucker,* 364 U.S. 479, 485 (1960). Third parties might be reluctant to provide information if disclosure of the information was mandatory. Similarly, persons might be reluctant to enter state service if a disclosure of all the information acquired by the state were required. It is not inconceivable that public exposure would lead to public pressure to have employees removed for reasons unrelated to their fitness and qualifications. *Cf. Shelton, supra,* 364 U.S. at 486-487.[28] The state likewise has an obligation to foster the rehabilitation of persons confined in correctional institutions and to insure the internal security of such institutions. *Pell v. Procunier,* 417 U.S. 817, 823 (1974). It is possible that various persons both within and outside of the correctional setting may have information relevant to these purposes which they might withhold if disclosure of the information was mandatory. In *Wolff v. McDonnell,* 418 U.S. 539, 567-569 (1974), this Court recognized that the disclosure of the identity of persons providing certain information could pose a serious threat to the security of correc-

[28]In *Shelton* this Court recognized that the public disclosure of the type of information which was required to be submitted by school teachers would serve to aggravate the impairment of the teachers' First Amendment rights. *Shelton, supra,* 364 U.S. at 486-487. Public disclosure of information regarding the personal

tional institutions.[29] Accordingly, numerous interests warrant the recognition of the expectation that information conveyed in confidence will not be disclosed in the absence of an overriding justification.

It is not suggested that it would be reasonable to expect that all information conveyed in confidence would never be disclosed. It is, however, urged that it is reasonable to expect that such information will not be disclosed without a determination that the need for disclosure outweighs the need for confidentiality. As this expectation is reasonable, the fact that it is not

lives of state employees might give rise to a claim of impairment of other protectable interests. *See generally Griswold v. Connecticut, supra,* 381 U.S. 479, 482-485 (1965).

[29]With respect to prison disciplinary proceedings, this Court observed: "If confrontation and cross-examination of those furnishing evidence against the inmate were to be allowed as a matter of course, as in criminal trials, there would be considerable potential for havoc inside the prison walls." *Wolff, supra,* 418 U.S. at 567. This Court further stated: "We recognize that the problems of potential disruption may differ depending on whom the inmate proposes to cross-examine. If he proposes to examine an unknown fellow inmate, the danger may be the greatest, since the disclosure of the identity of the accuser, and the cross-examination which will follow, may pose a high risk of reprisal within the institution. Conversely, the inmate accuser, who might freely tell his story privately to prison officials, may refuse to testify or admit any knowledge of the situation in question. Although the dangers posed by cross-examination of known inmate accusers, or guards, may be less, the resentment which may persist after confrontation may still be substantial. Also, even where the accuser or adverse witness is known, the disclosure of third parties may pose a problem. There may be a class of cases where the facts are closely disputed, and the character of the parties minimizes the dangers involved. However, any constitutional rule tailored to meet these situations would undoubtedly produce great litigation and attendant costs in a much wider range of cases. Further, in the last analysis, even within the narrow range of cases where interest balancing may well dictate cross-examination, courts will be faced with the assessment of prison officials as to the dangers involved, and there would be a limited basis for upsetting such judgments." *Wolff, supra,* 418 U.S. at 568-569.

an expectation of absolute privacy does not deprive it of Fourth Amendment protection. *See Mancusi v. DeForte,* 392 U.S. 364, 369-370 (1968).

When a state government official's duties include control over confidential documents, he may reasonably expect that he will not be compelled to disclose the documents in the course of civil litigation unless the litigant's justification for disclosure is found to outweigh those interests which the privilege of nondisclosure protects. *See EPA v. Mink,* 410 U.S. 73, 86-87 (1973). In such circumstances, the official cannot be said to be assuming a duty to disclose documents,[30] but rather is assuming a duty to assert the confidentiality of the documents. In short, as a representative of the public, the official has a duty to act in accordance with the interests of the public. "All such positions are trusts to be exercised from considerations of duty and for the public good." *Oscanyan v. Arms Co.,* 103 U.S. 261, 273 (1880).[31] Where disclosure of the information would be inimical to the public interest, the official may reasonably expect that he will not be compelled to disclose the documents unless there is a

[30]In *Wilson v. United States,* 221 U.S. 361, 380 (1911), it was observed that with respect to public records and official documents, the custodian had assumed a duty which superceded his claim of the privilege against self-incrimination. As the question of whether a custodian may invoke his own Fifth Amendment privilege is distinct from the question of whether a public official may invoke a governmental privilege, the language in *Wilson* in no way abrogates the duty of a public official to properly protect confidential documents.

[31]*See generally,* "Deterring Misuse of Confidential Government Information: A Proposed Citizens' Action," Joseph J. Kalo, 72 Mich.L.Rev. 1577 (1974).

determination that their utility in the litigation is paramount to the reasons for their confidentiality.

The "'right to privacy, [is] no less important than any other right carefully and particularly reserved to the People.' (Citations omitted)." *Griswold v. Connecticut, supra,* 381 U.S. 479, 485 (1965). State officers are no more[32] and no less[33] than the agents of the People. Unless government officers who have control over confidential documents assert this right, it could be effectively diluted. *Cf. Griswold, supra,* 381 U.S. at 481. In some circumstances, to require those whose privacy might be invaded to seek to restrain compliance with a motion to produce documents might result in an abrogation of their rights at the moment of their assertion. *Cf. N.A.A.C.P. v. Alabama,* 357 U.S. 449, 459 (1958). When it is the action of a court which might result in the denial of a constitutional right, the right might be irreparably abridged if not asserted by a party to the litigation. *See Barrows v. Jackson,* 346 U.S. 249, 257 (1953).

As it is reasonable to expect that confidential documents will not be disclosed unless it is shown that the justifications for disclosure are paramount to the reasons for confidentiality, such expectation is protected by the Fourth Amendment. By refusing to

[32]Article I, section 24, of the Constitution of California provides in pertinent part as follows: "This declaration of rights may not be construed to impair or deny others retained by the People."

[33]Article I, section 26, of the Constitution of California provides: "All political power is inherent in the people. Government is instituted for their protection, security, and benefit, and they have the right to alter or reform it when the public good may require."

inspect *in camera* the contested documents, the court below effectively foreclosed any opportunity for determing if such expectation was involved.

B. As Compulsory Process for the Production of Documents is a Constructive Search and Seizure, it may not Issue in Derogation of the Limitations Inherent in the Fourth Amendment:

It was recognized early in our history that the essence of a search and seizure is not the physical intrusion and taking of property, but rather is the element of compulsion to produce that which is otherwise protected. *See Boyd v. United States,* 116 U.S. 616, 621-622 (1886). The basic interest protected by the Fourth Amendment is not just the right to be free from physical intrusions, but rather is the right to be free from unwarranted invasions of privacy. *See Boyd, supra,* 116 U.S. at 630.[34]

Accordingly, it must be recognized that "the 'right to be let alone—the most comprehensive of rights and the right most valued by civilized men' (citation omitted) is not confined literally to searches and seizures as such, but extends as well to the orderly taking under compulsion of process, (citations omitted), . . ." *United States v. Morton Salt Co.,* 338 U.S. 632, 651-652 (1950). "[T]he subpoena, which has been termed a 'constructive' search, (citation omitted), is subject to Fourth Amendment limitations . . . *See v.*

[34]The vitality of the decision in *Boyd*, as well as its significance in the development of constitutional law, has been repeatedly recognized. *E.g., Olmstead v. United States, supra,* 277 U.S. 438, 474-475 (1928) (Brandeis, J., dissenting); *Mapp v. Ohio, supra,* 367 U.S. 643, 646-647 (1961); *Griswold v. Connecticut, supra,* 381 U.S. 479, 484 (1965).

City of Seattle, 387 U.S. 541, 545 (1967). As observed by this Court: "[A]n order for the production of books and papers may constitute an unreasonable search and seizure within the Fourth Amendment." *Hale v. Henkel,* 201 U.S. 43, 76 (1906). Accordingly, compulsory process for the production of documents may not issue in derogation of the limitations inherent in the Fourth Amendment. *See v. City of Seattle, supra,* 387 U.S. at 544-545.

1. As An Order Compelling the Production of Confidential State Documents Without a Prior Determination That the Documents Are Not Privileged is Not Authorized by Statute, the Order Contravenes the Fourth Amendment:

As stated by this Court, "The requirement of 'probable cause, supported by oath or affirmation,' literally applicable in the case of a warrant, is satisfied in that of an order for production *by the court's determination that the investigation is authorized by Congress, . . .*" *Okla. Press Pub. Co. v. Walling,* 327 U.S. 186, 209 (1946) (emphasis added). Accordingly, just as a search warrant may issue only upon a finding of probable cause, compulsory process may issue only upon a finding that it is authorized by statute. *See United States v. Morton Salt Co., supra,* 338 U.S. 632, 652 (1950); *See v. City of Seattle, supra,* 387 U.S. 541, 544 (1967); *Shotkin v. Nelson,* 146 F.2d 402, 404 (10th Cir. 1944). *Cf. Fed. Trade Comm. v. Amer. Tobacco Co.,* 264 U.S. 298 (1924).

Under the principle stated in *Oklahoma Press,* the court is required, in ruling upon a motion pursuant to Rule 37(a) (2) of the Federal Rules of Civil

Procedure for an order compelling the production of documents, to determine whether or not the production is authorized by statute. Rule 26(b) (1) of the Federal Rules of Civil Procedure explicitly excepts from discovery those matters which are privileged. Confidential state documents are privileged unless there is a showing and a determination that their utility in the litigation is paramount to the reasons for their confidentiality.

The district court, by refusing to inspect the contested documents *in camera,* foreclosed the possibility of an informed determination of whether or not the documents were privileged. This refusal by the district court is analogous to a refusal by a magistrate to read the affidavits submitted in support of an application for a search warrant.

Accordingly, the orders below compelling the production of confidential state documents, without an *in camera* inspection and determination of whether or not the production of such documents was authorized under Rule 26(b) (1) of the Federal Rules of Civil Procedure, is as defective as the issuance of a search warrant without an informed determination of probable cause for its issuance.

As confidential state documents are privileged unless there is an informed determination by the courts that their utility in the litigation is paramount, and as there is no statutory authority for an order compelling the production of privileged documents, it must be concluded that the orders issued in the instant proceeding contravene the Fourth Amendment.

2. As an Order by a Federal Court Compelling the Production of Confidential State Documents Without Any Informed Assessment of Their Utility in Resolving an Allegation of a Deprivation of Federal Rights Is Not Authorized by the Constitution, the Order Contravenes the Fourth Amendment:

As further stated by this Court, "the requirement of 'probable cause, supported by oath or affirmation,' literally applicable in the case of a warrant, is satisfied in that of an order for production *by the court's determination that the investigation . . . , is for a purpose Congress can order, . . .*" *Okla. Press Pub. Co. v. Walling, supra,* 327 U.S. 186, 209 (1946) (emphasis added). Accordingly, just as a search warrant may issue only upon a finding of probable cause, compulsory process may issue only upon a finding that there is no constitutional bar to its issuance *(see Gibson v. Florida Legislative Comm.,* 372 U.S. 539, 545 (1963)), and that there is constitutional authorization for its issuance *(cf. Fed. Trade Comm. v. Amer. Tobacco Co., supra,* 264 U.S. 298 (1924)). *See Okla. Press Pub. Co., supra,* 327 U.S. at 214; *Shotkin v. Nelson, supra,* 146 F.2d 402, 404 (10th Cir. 1944).

Under these principles, it is the duty of the court, in ruling upon a motion pursuant to Rule 37(a) (2) of the Federal Rules of Civil Procedure for an order compelling production of documents, first to determine if production of the documents is barred by a constitutional provision, and second to ascertain whether the court has constitutional authority to grant the order. The district court, by refusing to inspect the contested documents *in camera,* foreclosed the possibility of a determination of either issue.

As is set forth above (Argument II A.), the expectation that confidential state documents will not be disclosed unless it is determined that the justification for disclosure outweighs the justification for confidentiality is reasonable and is thus protected by the Fourth Amendment. Accordingly, if after having examined confidential state documents *in camera,* the court determined that there was no justification for disclosing the documents to the proponent of the motion, the Fourth Amendment would bar an order compelling production of the documents.

The district court's refusal to examine the contested documents *in camera* constituted an abdication of the court's duty to determine whether or not production was barred by the Fourth Amendment. By compelling production without any informed determination that the justification for disclosure was paramount to the reasons for confidentiality, the district court infringed the reasonable expectation that disclosure would not be required absent such a finding. Accordingly, the orders compelling production contravene the Fourth Amendment.

By refusing to examine the documents *in camera,* the district court likewise foreclosed a determination of whether the district court had constitutional authority to compel the production of the documents. In effect, the court failed to insure that it had jurisdiction to issue the orders for production.

The unique nature of the discovery compelled by the challenged orders is of critical significance. These

orders do not involve compelling individual state officers to respond to questions regarding their family background, their education, their professional training, their employment history, their physical and mental condition, and their professional and personal associations. These orders do not involve compelling individual state officers to respond to questions concerning the procedures which they employ in arriving at decisions in prison disciplinary or parole proceedings, the information considered by them in such proceedings, the criteria employed by them in arriving at decisions, and the reasons for their decisions. Rather, these orders involve compelling the production of state documents. In short, the orders are not concerned with obtaining discovery from individual defendants, but rather with obtaining discovery from the state.

In *Sugarman v. Dougall,* 413 U.S. 634, 648 (1973), this Court expressed "recognition of a State constitutional responsibility for the establishment and operation of its own government, as well as the qualifications of an appropriately designated class of public officeholders. (Footnote omitted). U.S. Const. Art. IV, § 4; U.S. Const. Amdt. X; (other citations omitted)." As further observed by this Court: "Just as 'the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections,' (citations omitted), '[e]ach State has the power to proscribe the qualifications of its officers and the manner in which they shall be chosen.' (Citations omitted). Such power inheres in the State by virtue of its obligation,

already noted above, 'to preserve the basic conception of a political community.' (Citation omitted). And this power and responsibility of the State applies, not only to the qualifications of voters, but also to persons holding state elective or important non-elective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government." *Sugarman, supra,* 413 U.S. at 647. Accordingly, it is submitted that the maintenance by the state of the personnel files, which the district court has ordered produced, is ancillary to the state's exercise of its political powers under the Tenth Amendment.

The administration of correctional facilities is likewise a function of state government. As observed by this Court: "It is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prison." *Preiser v. Rodriguez,* 411 U.S. 475, 491-492 (1973). Accordingly, it is further submitted that the maintenance by the state of certain confidential records, which the district court has ordered produced, is likewise ancillary to the state's exercise of its governmental powers and responsibilities.

As stated by former Chief Justice Stone: "It was not intended by the Fourteenth Amendment and the Civil Rights Acts that all matters formerly within the exclusive cognizance of the states should become matters of national concern." *Snowden v. Hughes,* 321

U.S. 1, 11 (1944). As observed by this Court: "[The] ruling that a state could not be controlled by courts in the performance of its political duties through suits against its officials has been consistently followed. (Citations omitted)." *Great Northern Ins. Co. v. Read,* 322 U.S. 47, 51 (1944).

"A state's freedom from litigation was established as a constitutional right through the Eleventh Amendment." *Great Northern Ins. Co. v. Read, supra,* 322 U.S. 47, 51 (1944). "This express constitutional limitation denied to the federal courts authority to entertain a suit brought by private parties against a state without its consent. (Citations omitted)." *Ford Co. v. Dept. of Treasury,* 323 U.S. 459, 464-465 (1945). "While the Amendment by its terms does not bar suits against a State by its own citizens, this Court has consistently held that an unconsenting state is immune from suits brought in federal courts by her own citizens as well as by citizens of another State. (Citations omitted)." *Edelman v. Jordan,* 415 U.S. 651, 662-663 (1974).

"Nor is the State divested of its immunity 'on the mere ground that the case is one arising under the Constitution or laws of the United States.' (Citations omitted). But the immunity may of course be waived; . . ." *Parden v. Terminal R. Co., supra,* 377 U.S. 184, 186 (1964). "But it has not heretofore been suggested that § 1983 was intended to create a waiver of a State's Eleventh Amendment immunity merely because an action can be brought under that section against state officers, rather than against the State itself."

Edelman v. Jordan, supra, 415 U.S. 651, 675-677 (1974).

"It is also well established that even though a State is not named a party to the action, the suit may nonetheless be barred by the Eleventh Amendment." *Edelman v. Jordan, supra,* 415 U.S. 651, 663 (1974). "[T]he crucial question is whether the relief sought in a suit nominally addressed to the officer is relief against the sovereign. (Footnote omitted)." *Larson v. Domestic & Foreign Corp.,* 337 U.S. 682, 687 (1949). "Of course, a suit may fail, as one against the sovereign, even if it is claimed that the officer being sued has acted unconstitutionally or beyond his statutory powers, if the relief requested can not be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property. (Citation omitted)." *Larson, supra,* 337 U.S. at 691, n. 11; *see Hopkins v. Clemson College,* 221 U.S. 636, 648-649 (1911). As the documents which are the subject of the contested orders compelling discovery are confidential state documents, such documents are unquestionably state property.

As recognized by this Court: "The Eleventh Amendment declares a policy and sets forth an explicit limitation on federal judicial power of such compelling force that this Court will consider the issue arising under this Amendment . . . even though urged for the first time in this Court." *Ford Co. v. Dept. of Treasury, supra,* 323 U.S. 459, 467 (1945). As this Court recently observed, "it has been well settled since

the decision in *Ford Motor Co. v. Department of Treasury, supra,* that the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court: . . ." *Edelman v. Jordan, supra,* 415 U.S. 651, 677-678 (1974).

Given the facts of the proceedings below, it is not necessary to determine whether the Eleventh Amendment poses a jurisdictional bar to all discovery orders for the production of state documents. Nor is it necessary to determine whether the Eleventh Amendment precludes all discovery orders for the production of confidential state documents. Rather, the question posed is whether the Eleventh Amendment precludes an order for the production of confidential state documents when such documents are not clearly probative of a claimed violation of federally protected rights.

It is submitted that the latter question must be answered in the affirmative. As stated by this Court: "[The] ruling that a state could not be controlled by courts in the performance of its political duties through suits against its officials has been consistently followed. (Citations omitted). Efforts to force, through suits against officials, performance of promises by the state collide directly with the necessity that a sovereign must be free from judicial compulsion in the carrying out of its policies within the limits of the Constitution. (Citations omitted)." *Great Northern Ins. Co. v. Read, supra,* 322 U.S. 47, 51 (1944). It is submitted that the application of this reasoning to a motion to compel the production of confidential state

documents requires the conclusion that the Eleventh Amendment precludes an order requiring the production of such documents unless it has been determined that the probative value of the documents with respect to a claimed deprivation of federal rights outweighs the reasons for confidentiality.

The district court, by refusing to examine the contested documents *in camera,* foreclosed a determination of whether the court had jurisdiction to compel production of all the contested documents. "The requirement of 'probable cause, supported by oath or affirmation,' literally applicable in the case of a warrant, is satisfied in that of an order for production by the court's determination that the investigation . . . is for a purpose Congress can order, . . ." *Okla. Press Pub. Co. v. Walling, supra,* 327 U.S. 186, 209 (1946). By refusing to examine the contested documents *in camera,* the district court abdicated its responsibility of determining whether it had jurisdiction to order the production of all the documents. Accordingly, it must be concluded that the orders below issued in derogation of the basic requirements of the Fourth Amendment.

3. An Order Compelling Production of Confidential State Documents Without a Prior Informed Determination That the Utility of the Documents is Paramount to the Reasons for Confidentiality is as Defective as is a Search Warrant Issued Without Probable Cause:

As stated by this Court: "The requirement of 'probable cause, supported by oath or affirmation,' literally applicable in the case of a warrant, is satisfied in that of an order for production by *the court's deter-*

mination that . . . the documents sought are relevant to the inquiry. (Footnote omitted)." (Emphasis added). *Okla. Press Pub. Co. v. Walling,, supra,* 327 U.S. 186, 209 (1946); *see United States v. Morton Salt Co., supra,* 338 U.S. 632, 652 (1950); *See v. City of Seattle, supra,* 387 U.S. 541, 544 (1967).

The basic principle that the power to compel information may not be used to obtain information not relevant to the authorized purpose of the inquiry has been invoked by this Court in a variety of contexts. With respect to the power of Congress to compel testimony, this Court stated: "There is no general authority to expose the private affairs of individuals without justification in terms of the functions of Congress. . . . No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress. Investigations conducted solely for the personal aggrandizement of the investigators or to 'punish' those investigated are indefensible." *Watkins v. United States,* 354 U.S. 178, 187 (1957). With respect to the power of the grand jury to compel testimony which may impinge upon a confidential relationship, this Court stated: "Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification." *Branzburg v. Hayes,* 408 U.S. 665, 707-708 (1972); *see also Id.,* at 710 (Powell, J., concurring); *United States v. Dionisio,* 410 U.S. 1, 12 (1973). As stated by Mr. Justice Holmes, with respect to the power of the Federal Trade Commission to compel the production of corporate records: "It is contrary to the first principles of justice to allow a search through all the respondents' records, relevant or irrelevant, in the hope that something will turn up. . . . The right of access given by the statute is to documentary evidence—not to all documents, but to such documents as are evidence. The analogies of the law do not allow the party wanting evidence to call for all documents in order to see if they do not contain it. Some ground must be shown for supposing that the documents called for do contain it." *Fed. Trade Comm. v. Amer. Tobacco Co., supra,* 264 U.S. 298, 306 (1924).

Rule 34(a) of the Federal Rules of Civil Procedure does not entitle a party to demand production of any and all documents. Rather, only documents which are not privileged and which are relevant to the subject matter may be demanded. F.R.Civ.P. 26(b) (1); *cf. Fed. Trade Comm. v. Amer. Tobacco Co., supra,* 264 U.S. 298, 306 (1924). Accordingly, on a motion pursuant to Rule 37(a) to compel production of documents, the court, in order to determine that the documents sought are within the scope of inquiry authorized by the discovery rules, must determine that the documents are not privileged and that the documents are relevant to the subject matter of the action. If the court fails to make these determinations, any resulting order is as defective as is a search warrant issued without a prior finding of probable cause.

Confidential state documents are entitled to be treated as privileged, unless their utility in the litigation is found to be paramount to the reasons for their

confidentiality.[35] Accordingly, such documents are not within the authorized scope of inquiry unless the latter determination is reached.

In the instant case, by refusing to examine the contested documents *in camera* the district court abdicated its duty of resolving this issue. Accordingly, the orders for production are as defective as is a search warrant issued without probable cause, as they issued without any informed determination that the documents came within the scope of inquiry authorized by Rule 26(b)(1).

4. A General Order to Produce Confidential State Documents Without a Prior Determination That Their Utility in the Litigation Outweighs Their Confidentiality, is as Defective as is a General Search Warrant:

This Court has likewise stated: "[T]he requirement of reasonableness, including particularity in 'describing the place to be searched, and the persons or things to be seized,' also literally applicable to warrants, comes down to specification of the documents to be produced adequate, but not excessive, for the purposes of the relevant inquiry." *Okla. Press Pub. Co. v. Walling, supra,* 327, U.S. 186, 209 (1946); *see, See v. City of Seattle, supra,* 387 U.S. 541, 544 (1967). An order to produce documents which is too broad to be regarded as reasonable effectuates an unreasonable search and seizure. *See United States v. Dionisio,*

[35]Given the nature of the confidential state documents sought and the subject matter of this litigation, it is submitted that the district court could have properly denied the motion at the outset on the ground that the documents bore no reasonable relationship to the claimed deprivation of federal rights.

supra, 410 U.S. 1, 11 (1973); *Hale v. Henkel,* supra, 201 U.S. 43, 76 (1906). As stated by this Court: "A general subpoena of this description is equally indefensible as a search warrant would be if couched in similar terms. (Citations omitted)." *Hale, supra,* 201 U.S. at 77.

Before a court will grant a broad request for the production of documents, there must be some evidence of their necessity or of their materiality. *See Hale v. Henkel, supra,* 201 U.S. 43, 77 (1906). As stated by Mr. Justice Holmes: "It is contrary to the first principles of justice to allow a search through all the respondents' records, relevant or irrelevant, in the hope that something will turn up." *Fed. Trade Comm. v. Amer. Tobacco Co., supra,* 264 U.S. 298, 306 (1924). The documents which are to be produced must be described with particularity. *See Hale, supra,* 201 U.S. at 77. Where the precise contents of the documents can be determined, a general order for production is unreasonable. *Cf. McPhaul v. United States,* 364 U.S. 372, 382 (1960).

Confidential state documents are not subject to discovery unless it is determined that their utility in the litigation outweighs the reasons for their confidentiality. When the documents are offered for *in camera* inspection, the precise contents of the documents are known to the court. The court may determine specifically which documents or parts of documents are of such significance to the litigation that they may be the subject of discovery. Any resulting order to compel must necessarily specify with particu-

larity those matters which have been found by the court to be discoverable. A general order to produce all the confidential documents, without regard to whether or not their utility in the litigation is paramount, would be patently unreasonable.

The district court could have determined the precise contents of the confidential state documents by examining them *in camera*. The district court refused to do so, and instead, issued orders which are expressly all inclusive. By refusing to inspect the documents, the district court abdicated its responsibility of specifically delineating those documents which were within the scope of allowable discovery. The resulting orders are as indefensible as a general search warrant.

In short, at the core of the Fourth Amendment directive is the requirement of an informed determination by a judicial officer that there is justification for the action which is to be taken. *See Gerstein v. Pugh,* ..... U.S. ....., 95 S.Ct. 854, 862 (1975); *see also See v. City of Seattle, supra,* 387 U.S. 541, 544-545 (1967); "The gist of the protection is in the requirement, expressed in terms, that the disclosures sought shall not be unreasonable." *Okla. Press Pub. Co. v. Walling, supra,* 327 U.S. 186, 208 (1946). The district court abdicated its responsibility and its resulting orders are patently unreasonable. As the orders contravene the basic limitations inherent in the Fourth Amendment, they must be set aside.

III

THE COURT OF APPEALS ERRED IN DENYING DEFENDANTS' APPLICATIONS FOR MANDAMUS INASMUCH AS THE DISTRICT COURT DID NOT HAVE THE LEGAL POWER TO ACT OR REFUSE TO ACT AS IT DID.

When confronted with the demand to produce for inspection every twentieth inmate file in the custody of defendant Procunier, Director of the Department of Corrections, Mr. Procunier and the other defendants asserted that though they were defendants they were also state government officials with responsibilities beyond the parameters of the law suit. In their view, these obligations precluded the indiscriminate revelation of the contents of their files on prison inmates. Consequently, defendants were presented with three alternatives, namely, consenting to the random search of government maintained files which might disclose information jeopardizing and compromising lives and safety; or resisting all production even though such random search might produce relevant and unobjectionable material; or permitting inspection but submitting to the district court the sensitive documents upon which the district court *in camera* might examine the merits of the claims of confidentiality and privilege. Defendants urged this latter course asking the district court to be the mediator of allegedly opposing interests. Accordingly, defendants explained to the district court their official interest in protecting individuals, including informants inside and outside of prisons, and their concern for prison security; their official need to preserve the confidentiality of records for the purpose of encouraging the candor of inmates,

staff, and inmates' families and friends; their official duty under state laws to protect the privacy of certain persons and papers (A. 173-177, 226-228, 255-259, 289-293). Defendants believed that if they were allowed to review the files as a preliminary matter, then any allegedly sensitive information might be withheld and examined by the court as a condition precedent to releasing or retaining. Notwithstanding this posture, the district court quashed defendants' efforts to segregate the confidential and privileged documents and ordered: "All such central files [200 selected by plaintiffs] made available upon request by plaintiff shall be produced without any material, memos, documents, summaries, reports, letters or other papers of any kind, shape or form, having been removed, altered, deleted or transferred in any way by defendants prior to plaintiffs' inspection" (petition for certiorari, appendix, p. xxvi). Defendants sought mandamus in the United States Court of Appeals for the Ninth Circuit and on December 18, 1974, the application was denied (petition for certiorari, appendix, p. xxiii).

When also faced with a demand to conduct a random search of other files maintained by the California Adult Authority and the California Department of Corrections, including the personnel files of each Adult Authority member, of each Adult Authority hearing representative and of the Adult Authority's executive officer, defendants urged that any access by plaintiffs to these personnel files, investigative reports, preliminary drafts, notes, inter-agency and intra-agency memoranda, should be preceded by an *in camera* inspection for the purposes of determining their relevances and of balancing the interest of defendants and of the public in non-disclosure against plaintiffs' interest in examining these files for the litigation. The district court declined to order such an *in camera* inspection (petition for certiorari, appendix, pp. xvi-xvii). The Court of Appeals, on defendants' application for mandamus, determined that the district court's order compelling defendants to turn over everything directly to plaintiffs was not such a usurpation by the district court that warranted the extraordinary remedy for a writ of mandamus (A. 719-720).

Both mandamus actions brought into focus the picture of prisoner plaintiffs indiscriminately searching non-public government files in an area where the state had interests to protect separate from the interests generated by the law suit. The district court, in each instance, gave plaintiffs unlimited inspection rights to government records regardless of the consequences. Defendants requesting no more than a preliminary opportunity to present their claims of confidentiality or privilege to the district court, were set adrift without remedy to meet certain, irreparable harm. Once disclosure is a fact the damage cannot be undone anymore than a bell can be unrung.[36]

[36]The so-called protective orders did not preserve confidentiality or privileges. Plaintiffs' attorneys and two certified law students are allowed unrestricted viewing of an inmate's file with photocopying of any or all contents with consent of the inmate; where photocopies are made plaintiffs may use them "as necessary for acquittal of their duties of representation in this case" (petition for certiorari, appendix, pp. xxvii-xxviii). The typical file, how-

Review by appeal from final judgment would come too late. The actions of the district court, in ordering the immediate disclosure of government documents, without affording defendants an opportunity to withhold confidential and privileged items and the occasion to offer those items for *in camera* examination, presented an issue of substantial importance, in this litigation and in other cases, which was reviewable by mandamus. Resolution of this issue will forestall future error in trial courts, eliminate any uncertainty and add importantly to the efficient administration of justice. *Schlagenhauf v. Holder,* 379 U.S. 104, 110-111 (1964) ["new and important problems"]; *LaBuy v. Howes Leather Co.,* 352 U.S. 249, 255-260 (1957) ["an abdication of the judicial function]; *Roche v. Evaporated Milk Assn.,* 319 U.S. 21, 26 (1943) ["exercise its authority when it is its duty to do so"]; *see also United States v. Weinstein,* 511 F.2d 622, 626-628 (2d Cir. 1975) ["district judge clearly exceeded his powers"]; *Nixon v. Sirica,* 487 F.2d 700, 706-708 (D.C.Cir. 1973) ["great public interest in prompt resolution of the issues"].

The district court did not have the legal power to order the contents of government files, maintained by and in the custody of petitioners, indiscriminately searched by plaintiffs, and the district court misused

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ever, contains few papers written by the inmate himself, and a considerable number of papers written by other persons who have not authorized the inmate to consent to their exposition. As to the personnel files, observation and reproduction are not precluded; a restriction permits the files or copies of their content to be shown to plaintiff's attorneys and two investigators only (petition for certiorari, appendix, p. xvi).

its jurisdiction and authority in ordering over defendants' objections unrestrained access to these records and in refusing to conduct an *in camera* inspection. An important question in the administration of the Federal Rules of Civil Procedure was thus presented. A petition for a writ of mandamus was the appropriate procedure (28 U.S.C. § 1651) to review the district court's actions. *See United States v. United States District Court,* 407 U.S. 297, 301 n.3 (1972). The Court of Appeals failed to exercise this appellate supervisory power and erred in not granting the writs sought by defendants.

CONCLUSION

The problems presented by California in this proceeding are not unique; they represent persistent and repeated difficulties encountered by state officials who are often confronted with broad, encroaching discovery demands and orders. This litigation highlights the issues because in actions brought by state prisoners against state parole and prison administrators, questions of confidentiality and privilege of information invariably arise. Resolution of these matters in this certiorari proceeding will significantly aid the administration of justice.

Petitioners request that the orders of the Court of Appeals, and of the district court be vacated, and that the case be remanded with directions that production of the confidential documents not be compelled without a prior informed determination by the district

court that plaintiffs' need for them in the action below outweighs their confidentiality.

Dated: July 24, 1975

EVELLE J. YOUNGER,
Attorney General of the State of California,
JACK R. WINKLER,
Chief Assistant Attorney General—
Criminal Division,
DERALD E. GRANBERG,
Deputy Attorney General,
JOHN T. MURPHY,
Deputy Attorney General,
KARL S. MAYER,
Deputy Attorney General,
JEAN M. BORDON,
Deputy Attorney General,
Attorneys for Petitioners.

(Appendix Follows)

APPENDIX

Appendix

(Letterhead of Youth Law Center)

June 4, 1975

HAND DELIVERED

Karl S. Mayer, Esq.
Deputy Attorney General
6000 State Building
350 McAllister Street
San Francisco, CA 94102

Dear Mr. Mayer:

Re: *van Geldern v. Kerr*

Now that the Supreme Court has granted *certiorari* in the *Kerr* case, it is obvious that plaintiffs will be unable to inspect 200 selected files in their entirety, as ordered by Judge Weigel. Accordingly, we are resigned to conducting our initial inspection of the requisite files subject to the withholding, by the Department, of those documents which it considers to be confidential. Since the commencement of trial is now only two months away, it is essential that we begin to inspect a limited number of central files as soon as possible, and therefore I am listing on an enclosure to this letter, the names of nine (9) inmates whose files we wish to inspect. We ask that, in a spirit of cooperation, these files be made available to us at the Ferry Building in San Francisco, as soon as possible, and in any event no later than Monday, June 16, 1975. We also ask that as little material as possible be removed from them, assuring you that we consider ourselves still bound by the provisions in Judge Wei-

gel's orders limiting our use of these documents to the *van Geldern* case.

Please telephone me at once if for any reason these files cannot be made available by June 16th as requested.

Thank you for your cooperation in this matter.

Yours very truly,

/s/ B. E. Bergesen, III

B. E. Bergesen, III

cc: Sidney M. Wolinsky, Esq.
BEB/cc
Enclosure

CENTRAL FILES TO BE INSPECTED BY PLAINTIFFS' COUNSEL IN *van Geldern v. Kerr*:

(1)	Michael Guile	B-5757
(2)	James Snow	B-19205
(3)	Charles M. Perkins	B-29898
(4)	Willie C. Reaves	B-22929
(5)	Stanley Lowe	B-60327
(6)	Leonard J. Hodgson	B-36473
(7)	L. Wayne Benner	A-84104
(8)	Raymond Laursen	B-26430
(9)	Robert Barry	B-18055

(Letterhead of Office of the Attorney General, Department of Justice)

State Building, San Francisco 94102

June 10, 1975

B. E. Bergesen, III
693 Mission Street, 2nd Floor
San Francisco, CA 94105

Re: *van Geldern v. Kerr*—Inspection of Inmate Files

Dear Mr. Bergesen:

Your letter of June 4, 1975 requests inspection of the correctional files of nine designated inmates subject to the withholding of documents considered by the Department of Corrections to be confidential. The attachment to your letter names the nine inmates designated whose files you wish to inspect, together with their correctional numbers but does not designate the institution within which they are confined. Your letter does not include the written statements of consent, if any, from the designated inmates.

I have contacted departmental counsel for the Department of Corrections and the department agrees that the inspection may take place under the following circumstances:

(1) The inspection should take place at the institution within which the inmate is confined.

(2) You should contact the institution directly to request to inspect a particular inmate's file and furnish the institution the statement of the inmate's consent for such inspection.

(3) The inspection may be carried out by licensed investigators or certified law students designated by you.

(4) Within reason you will be permitted to obtain copies of the contents of the files furnished for inspection.

In arranging for the file inspections you should contact directly the records officers of the respective institutions. Please give them as much advance time as possible to enable them to pull the files and go through them for confidential material. If the inspection will be carried out by a designated investigator a certified law student should also tell the records officer in advance of this. If any problem or question arises as a result of your contact with any of the records officers please inform me immediately of it.

I request that you furnish me in advance a list of the inmates whose files you will inspect together with their institutional number, the institution of their confinement, copies of their statements of consent to the inspection, the name of the person who will inspect the files, and the date on which you have requested the inspection to take place.

This will also confirm my understanding that you and co-counsel consider yourselves bound by the protective provisions in Judge Weigel's orders which limit use of the documents to the *van Geldern* case.

Very truly yours,
Evelle J. Younger,
Attorney General

/s/ Karl S. Mayer,
Karl S. Mayer,
Deputy Attorney General

KSM:pc

CALIFORNIA PENAL CODE

§ 11105. Information furnished; application; purpose

(a) The Attorney General shall furnish, upon application in accordance with the provisions of subdivision (b) of this section, copies of all summary criminal history information pertaining to the identification of any person, such as a plate, photograph, outline picture, description, measurement, or any data about such person of which there is a record in the office of the department.

(b) Such information shall be furnished to all peace officers, district attorneys, probation officers, and courts of the state, to United States officers or officers of other states, territories, or possessions of the United States, or peace officers of other countries duly authorized by the Attorney General to receive the same, and to any public defender or attorney representing such

person in proceedings upon a petition for certificate of rehabilitation and pardon pursuant to Section 4852.08, upon application in writing accompanied by a certificate signed by the peace officer, public defender, or attorney, stating that the information applied for is necessary for the due administration of the laws, and not for the purpose of assisting a private citizen in carrying on his personal interests or in maliciously or uselessly harassing, degrading or humiliating any person.

(c) Such information shall not be furnished to any persons other than those listed in subdivision (b) of this section or as provided by law; provided, that such information may be furnished to any state agency, officer, or official when needed for the performance of such agency's, officer's, or official's functions.

* * *

ARTICLE 5: EXAMINATION OF RECORDS

§ 11120. Record defined

As used in this article, "record" with respect to any person means the master record sheet maintained under such person's name by the Department of Justice, and which is commonly known as "arrest record," "criminal record sheet," or "rap sheet." "Record" does not include any other records of the department.

§ 11121. Purpose

It is the function and intent of this article to afford persons concerning whom a record is maintained in

the files of the bureau such reasonable opportunity to examine the record compiled from such files, and to refute any erroneous or inaccurate information contained therein as is consistent with the requirements and functions of the bureau.

§ 11122. Application; contents; fee

Any person desiring to examine a record relating to himself shall obtain from the chief of police of the city of his residence, or, if not a resident of a city, from the sheriff of his county of residence, or from the office of the department, an application form furnished by the department which shall require his fingerprints in addition to such other information as the department shall specify. The city or county, as applicable, may fix a reasonable fee for affixing the applicant's fingerprints to the form, and shall retain such fee for deposit in its treasury.

§ 11123. Submission of application; fee

The applicant shall submit the completed application directly to the department. The application shall be accompanied by a fee of five dollars ($5) or such higher amount, not to exceed ten dollars ($10) that the department determines equals the costs of processing the application and making a record available for examination. All fees received by the department under this section are hereby appropriated without regard to fiscal years for the support of the Department of Justice in addition to such other funds as may be appropriated therefor by the Legislature.

§ 11124. Notice of existence of record; time of inspection; examination; authority to take notes

When an application is received by the department, the department shall determine whether a record pertaining to the applicant is maintained. If such record is maintained, the department shall inform the applicant by mail of the existence of the record and shall specify a time when the record may be examined at a suitable facility of the department. Upon verification of his identity, the applicant shall be allowed to examine the record pertaining to him, or a true copy thereof, for a period not to exceed one hour. The applicant may not retain or reproduce the record but he may make a written summary or notes in his own handwriting.

§ 11125. Application of prisoner; place of examination of record

If the applicant is imprisoned in the state prison or confined in the county jail, his application shall be through the office in charge of records of the prison or jail. Such offices shall follow the provisions of this article applicable to cities and counties with respect to applications and fees. When an application is transmitted to the department pursuant to this section, the department shall make arrangements for the applicant to examine the record at his place of confinement. In all other respects, the provisions of Section 11124 shall govern the examination of the record.

§ 1203.01. Statement of views respecting convict; filing; mailing of copies

Immediately after judgment has been pronounced, the judge and the district attorney, respectively, may cause to be filed with the clerk of the court a brief statement of their views respecting the person convicted or sentenced and the crime committed, together with such reports as the probation officer may have filed relative to the prisoner. The judge and district attorney shall cause such statements to be filed if no probation officer's report has been filed. The attorney for the defendant and the law enforcement agency that investigated the case may likewise file with the clerk of the court statements of their views respecting the defendant and the crime of which he was convicted. Forthwith after the filing of such statements and reports, the clerk of the court shall mail a copy thereof, certified by such clerk, with postage thereon prepaid, addressed to the Department of Corrections at the prison or other institution to which the person convicted is delivered. The clerk shall also mail a copy of any statement submitted by the court, district attorney, or law enforcement agency, pursuant to this section, with postage thereon prepaid, addressed to the attorney for the defendant, if any, and to the defendant in care of the Department of Corrections, and a copy of any statement submitted by the attorney for the defendant, with postage thereon prepaid, shall be mailed to the district attorney.

§ 2081.5. Case records; duty to keep; contents; employees; hearings

The Director of Corrections shall keep complete case records of all prisoners under custody of the department, which records shall be made available to the Adult Authority and the Board of Trustees of the California Institution for Women at such time and in such form as each board may prescribe.

Case records shall include all information received by the Director of Corrections from the courts, probation officers, sheriffs, police departments, district attorneys, State Department of Justice, Federal Bureau of Investigation, and other interested agencies and persons. Case records shall also include a record of diagnostic findings, considerations, actions and dispositions with respect to classification, treatment, employment, training, and discipline as related to the institutional correctional program followed for each prisoner.

The director shall appoint, after consultation with the Adult Authority, such employees of the various institutions under his control as may be necessary for the proper performance of the duties of the Adult Authority, and when requested shall also have an attendance at hearings of the Adult Authority, psychiatric or medical personnel. The director shall furnish, after consultation with the Adult Authority and the Director of General Services, such hearing rooms and other physical facilities at such institutions as may be necessary for the proper performance of the duties of the Adult Authority.

§ 3022. Notice of meeting to fix term

At least 30 days before the Adult Authority shall meet to fix and determine the length of time any prisoner shall be confined, the authority shall send written notice thereof to each of the following persons who has made request therefor: the judge of the superior court before whom the prisoner was tried and convicted, the attorney for the defendant and the district attorney of the county from which the prisoner was sentenced and the law enforcement agency that investigated the case.

§ 3042. Notice of parole meeting

At least 30 days before the Adult Authority shall meet to consider the granting of a parole to any prisoner the authority shall send written notice thereof to the Director of Corrections and to each of the following persons who has made request therefor: the judge of the superior court before whom the prisoner was tried and convicted, the attorney for the defendant and the district attorney of the county from which the prisoner was sentenced and the law enforcement agency that investigated the case.

§ 3046. Persons imprisoned under life sentence; minimum term; consideration of statements and recommendations; order

No prisoner imprisoned under a life sentence may be paroled until he has served at least seven calendar years. The Adult Authority shall, in considering a parole for such prisoner, consider all statements and

recommendations which may have been submitted by the judge, district attorney, and sheriff, pursuant to Section 1203.01, or in response to notices given under Sections 3022 and 3042, and recommendations of other persons interested in the granting or denying of such parole. The authority shall enter on its order granting or denying parole to such prisoners, the fact that such statements and recommendations have been considered by it. Such statements and recommendations shall, however, be and remain confidential.

CALIFORNIA GOVERNMENT CODE

§ 6254. Exemption of particular records

Except as provided in Section 6254.7 [relating to air pollution data], nothing in this chapter shall be construed to require disclosure of records that are:

(a) Preliminary drafts, notes, or interagency or intra-agency memoranda which are not retained by the public agency in the ordinary course of business, provided that the public interest in withholding such records clearly outweighs the public interest in disclosure;

* * *

(c) Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy;

* * *

(f) Records of complaints to or investigations conducted by, or records of intelligence information or

security procedures of, the office of the Attorney General and the Department of Justice, and any state or local police agency, or any such investigatory or security files compiled by any other state or local agency for correctional, law enforcement or licensing purposes;

* * *

(k) Records the disclosure of which is exempted or prohibited pursuant to provisions of federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege.

* * *

§ 6255. Justification for withholding of records

The agency shall justify withholding any record by demonstrating that the record in question is exempt under express provisions of this chapter or that on the facts of the particular case the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record.

CALIFORNIA EVIDENCE CODE

§ 1040. Privilege for official information. (a) As used in this section, "official information" means information acquired in confidence by a public employee in the course of his duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made.

(b) A public entity has a privilege to refuse to disclose official information, and to prevent another

from disclosing such information, if the privilege is claimed by a person authorized by the public entity to do so and:

(1) Disclosure is forbidden by an act of the Congress of the United States or a statute of this state; or

(2) Disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice, but no privilege may be claimed under this paragraph if any person authorized to do so has consented that the information be disclosed in the proceeding. In determining whether disclosure of the information is against the public interest, the interest of the public entity as a party in the outcome of the proceeding may not be considered.